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87-6173

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

WILLIE JASPER DARDEN,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, WILLIE JASPER DARDEN, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARK EVAN OLIVE
Chief Assistant CCR

JAMES C. LOHMAN
Attorney at Law

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR PETITIONER

BY: _____
Attorney

AFFIDAVIT

STATE OF FLORIDA)
) ss.
COUNTY OF BRADFORD)

I, WILLIE JASPER DARDEN, being first duly sworn, depose and say that I am the petitioner herein, that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of filing the petition are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your wages or salary per month, and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

No.

2. Have you received within the last twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

No.

3. Do you own any cash, savings or checking account?

a. If the answer is yes, state the total value of the items owned.

yes.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other property of value (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

no.

5. List the persons who are dependent upon you for support and state your relationships to those persons.

no.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Willie Darden
WILLIE JASPER DARDEN

SUBSCRIBED AND SWORN TO before me this 27th day of October, 1987.

Sonarene Harris
NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Aug. 12, 1989
Bonded Thru Tony Auto - Commission Inc.

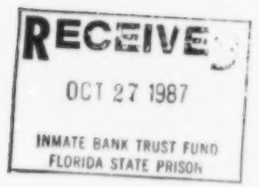
STATEMENT OF PRISON ACCOUNT

The business records of Florida State Prison, Starke, Bradford County, Florida, indicate that WILLIE JASPER DARDEN has balance of $ 1657.25 as of this date.

NAME Melody King

TITLE Inmate Bank

DATE October 27 1987



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Richard W. Prospect, Assistant Attorney General, Department of Legal Affairs, Beck's Building, 4th Floor, 125 North Ridgewood, Daytona Beach, Florida 32014, this 2nd day of January, 1988.

Attorney

87-6173

No. _____

Supreme Court, U.S.
FILED
JAN 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

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OCTOBER TERM 1987

WILLIE JASPER DARDEN,

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Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether new evidence which demonstrates that the offense occurred at a time when it would have been impossible for petitioner to have been the culprit, and which reflects that trial counsel was ineffective in investigating alibi, should be barred from consideration by Rule 9(b), Rules Governing Section 2254 cases.

2. Whether it is ineffective assistance of counsel for an attorney to fail to investigate and determine the time of an offense when the defense presented is alibi.

3. Whether the Eleventh Circuit Court of Appeals erred by finding that the record in this case revealed an offense time of 6:00 p.m. when this Court previously found that the crime occurred at 5:30 p.m.

4. Whether it is an abuse of discretion for a federal district court judge summarily to dismiss a second or subsequent petition brought by a petitioner pursuant to 28 U.S.C. Sec. 2254, without considering whether a) claims previously raised should be addressed again in the interest of justice, and whether b) with respect to a claim raised for the first time, the petitioner, as opposed to his counsel, knowingly, intelligently, and intentionally failed to raise the claim earlier.

5. Whether when determining if the ends of justice require a court to address a claim that has been previously raised in a petition pursuant to 28 U.S.C. Sec. 2254, the federal district court is required to presume that the new facts pled in support of the claim are true.

6. Whether the lower court opinion is in conflict with this Court's decisions in Sanders v. United States, 373 U.S. 1

(1963); Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986); Blackledge v. Allison, 431 U.S. 75 (1977); Townsend v. Sain, 372 U.S. 688 (1984) and Washington v. Strickland, 466 U.S. 668 (1984), and in conflcit with 28 U.S.C. Section 2244(b), 28 U.S.C. Section 2254, and Rule 9(b) of the Rules Governing Section 2254 cases.

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WILLIE JASPER DARDEN,

Petitioner,

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RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, WILLIE JASPER DARDEN, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed August 5, 1987, and states:

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 825 F.2d 287 (11th Cir. 1987), and is contained in Appendix A. The Order of the United States District Court, Middle District of Florida, dismissing the petition for writ of habeas corpus is contained in Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on August 5, 1987. No petition for rehearing was filed. Thereafter, Justice O'Connor entered an order extending the time within which to file the petition for writ of certiorari to and

including January 2, 1988. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense;

the Eighth Amendment which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

It also involves section 921.141, Florida Statutes (1979), which is contained in Appendix C.

I. STATEMENT OF THE CASE

A. Course of Prior Proceedings

1. The Petition for Writ of Habeas Corpus

After this Court's decision in Darden v. Wainwright, 106 S. Ct. 2464 (1986), witnesses came forward with evidence that "support[ed] the alibi that petitioner could not have been in two different places at the same time," Darden v. Dugger, 825 F.2d 287, 293 (11th Cir. 1987), and which if true demonstrated that Mr. Darden was innocent. Mr. Darden filed a petition for writ of habeas corpus in the federal district court alleging in Claim I that trial counsel had been ineffective in failing to investigate the time of the offense which was, as it turns out, at a time of

day which precludes a finding that Mr. Darden is guilty.1/ The federal district court judge, without hearing from the new witnesses, summarily dismissed this claim as an abuse of the writ. See Section I, C, infra. The court of appeals found no abuse of discretion, and affirmed the district court's actions. Darden v. Dugger, supra.

Mr. Darden's second claim was that the trial identifications of him were the results of impermissibly suggestive pre-trial identification procedures, in violation of due process. Since the two identifications were the centerpiece of the state's case, their utter unreliability goes to the core of whether Mr. Darden received a fair trial, and, importantly, whether he is innocent.2/ The district court also summarily dismissed this claim as an abuse of the writ, and the circuit court affirmed. Darden v. Dugger, supra.

---

1. Doubt about Mr. Darden's guilt leaps just from the trial transcript, unaided by the new evidence. The trial judge actually found as a mitigating circumstance at capital sentencing that Mr. Darden was believable in his testimony before the judge and jury that he was innocent. Darden v. Wainwright, supra, 106 S.Ct. at 2482 (Blackman, J., dissenting). The jury's sole job was to assess "the credibility of three witnesses -- Helen Turman and Phillip Arnold, on the one side, and Willie Darden, on the other," and Mr. Darden lost this credibility contest only after an "egregious" and "shameful" diatribe by the prosecutor in summation to the jury. Id.

2. Four members of this Court have already concluded that the identifications were unreliable:

> While the question of whether the various in- and out-of-court identifications ought to have been suppressed is not now before the Court, my confidence in their reliability is nonetheless undermined by the suggestiveness of the procedures by which they were obtained, particularly in light of Mrs. Turman's earlier difficulties in describing the criminal.

Darden v. Wainwright, 106 S. Ct. 2464, 2482 (1986) (Blackman, J., dissenting) (footnote omitted).

2. Mr. Darden's Prior Petitions

Mr. Darden's case is unprecedented because of its complex procedural history, and because of the starkly simple reason why that history has occurred -- many learned jurists believe his trial was unfair, and he is possibly innocent. This Court is thoroughly familiar with the procedural history, and with the judicial disunity that has become the case's legacy. Darden v. Wainwright, 106 S. Ct. 2464 (1986). The lower court opinion contained a detailed discussion of the history, See Appendix A, and it will not be repeated here in total. However, the prior treatment of an ineffective assistance and an identification claim is important to their resolution in this proceeding, and the earlier treatment of those claims is presented.

In his petition filed in 1979, Mr. Darden alleged, inter alia, that trial counsel was ineffective in preparing the alibi defense, because counsel did not interview or present important witnesses, most notably witness Christine Bass.1/ Appendix E. Ms. Bass testified at a hearing before the United States Magistrate that Mr. Darden was outside of her house on the day of the offense between 4:00 and 5:30 p.m. having automobile trouble. The magistrate analyzed her testimony, and the testimony of trial counsel, and concluded that counsel had not been ineffective in not presenting Ms. Bass' testimony at trial because:

> The Public Defenders believe that the crime had been committed between 6:00 and 6:15 P.M. (H 235) and the accident occurred between 6:15 and 6:30 P.M. (H 213) The call concerning the homicide was received by the Lakeland Police Department at 6:31 P.M. (H 235); the accident was reported to the Hillsborough County Police Department at 6:32 P.M. (H 239-240). Mr. Johnson indicated that

---

3. The new witnesses, presented in the current petition, were not presented in 1979. It was not until 1986 that these witnesses discovered the importance of their knowledge and came forward. See Darden v. Dugger, 825 F.2d 287, 293, fn. 17 (11th Cir. 1987).

it was the opinion of the defense that there was not a good alibi defense on behalf of Petitioner because of the gap of time between when he was last seen prior to the accident, and the time when the crime occurred. (H 232) Attempts to locate anyone who could verify Petitioner's testimony concerning the repair of his car's muffler had been unsuccessful. (H 237)

Mr. Goodwill indicated that Petitioner did not provide the defense with any information which could account for his presence from 5:30 to 6:35 PM; (H-291) Mr. Goodwill further indicated that the evidence which was available to the defense did not preclude Petitioner from having been the assailant. (H291).

. . . .

With regard to defense counsels' decision to call Petitioner as the sole defense witness, Mr. Johnson testified that this decision was a calculated trial tactic, planned for the purpose of giving defense counsel the final closing argument before the jury. (H 236) Having already concluded that there was no real valid alibi defense which could be made on behalf of Petitioner (H 236), defense counsel believed that presenting a poor alibi was worse than no alibi at all. (H 236)

App. B. Without any written analysis of the claim, the federal district court adopted the Magistrate's findings. Darden v. Wainwright, 513 F. Supp. 947, 963 (M.D.Fla. 1984). The Eleventh Circuit Court of Appeals never specifically addressed the claim in any of its opinions granting or denying relief to Mr. Darden. The original panel simply found that counsel was not ineffective, without discussing the actual allegations. Darden v. Wainwright, 699 F.2d 1031, 1037 (11th Cir. 1983). The en banc court never mentioned the specifics of the claim, but simply affirmed the magistrate without comment, Darden v. Wainwright, 708 F.2d 646 (11th Cir. 1983); Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984); Darden v. Wainwright, 767 F.2d 752 (11th

Cir. 1985), while struggling and writing about other issues.4/

Also in the 1979 petition, counsel for Mr. Darden included a claim that Mrs. Turman's identification of Mr. Darden resulted in a due process violation. No claim was raised regarding the identification by Phillip Arnold. Before the Mrs. Turman claim was adjudicated, it was withdrawn from the petition by counsel. The only mention of its withdrawal, and the reason for it, is contained in a cryptic sentence in a stipulation that "[a]llegations that the preliminary hearing in the petitioner's case was utilized as an improper and unduly suggestive show-up are hereby withdrawn and abandoned as being not well-formed in the context of a separate issue." SROA (Vol. 1) - (Doc. 22) - (p. 1) (Eleventh Circuit Record on Appeal). Mr. Darden did not withdraw the Mrs. Turman issue, did not sign the stipulation, was not present when counsel did, and has never been asked about it. In the instant petition, petitioner raised the Phillip Arnold and the Turman identifications 5/, and averred that he had never intentionally failed to present either claim.

---

4. The lower court in rejecting the new evidence claim acted as if the Eleventh Circuit Court of Appeals had thoroughly addressed the claim in previous opinions: "This claim has been exhaustively litigated . . . ." Darden v. Dugger, 825 F.2d 287, 293 (11th Cir. 1987). In fact, a claim that trial counsel was ineffective vis-a-vis alibi was litigated before the magistrate in a brief hearing in 1979 but it was hardly "exhaustive" litigation (Christine Bass), and the court of appeals has never worked up a sweat over the issue.

The claim that counsel was ineffective for not learning when the crime occurred has never been litigated, even before the Magistrate, yet the lower court, while acknowledging that the new witnesses "support the alibi," Darden v. Dugger, 825 F.2d 287, 293 (11th Cir. 1987), and without requiring a hearing, "found" that this new information "does not alter what has been determined regarding counsel's performance as a matter of law." Id., fn. 19.

5. The identification issue in the instant petition thus contains a claim not raised before in any manner in federal court, Phillip Arnold's identification, and a claim once raised, but never adjudicated, Mrs. Turman's identification. The lower court incorrectly treated both identifications as having been previously raised, and abandoned. Darden v. Dugger, 825 F.2d 287, 294 (11th Cir. 1987)

In a 1985 petition, filed before the 1979 denials became final, Mr. Darden raised claims not included in his 1979 petition, and the federal district court instantly found abuse of the writ and summarily dismissed the petition. That dismissal figured prominently in the dismissal of the current petition, as explained in Section I, C, infra.

B. Statement of the Facts

1. Ineffective Assistance and Innocence

Mr. Darden's allegations would certainly have entitled him to an evidentiary hearing, if this were a first-writ case. He pled that specific omissions of counsel were non-tactical and unreasonable, and that there was a reasonable probability that but for the omissions the result (either conviction or death sentence) would have been different. ROA (Vol. 1) - (Doc. 1) - (pp. 13-51). In a nutshell, the allegations, supported with specific detailed affidavits, were that alibi was the defense in the case, and that trial and pre-trial counsel unreasonably failed to investigate "time of the offense" which, if reasonably investigated, would have revealed that it was not possible for Mr. Darden to be guilty. Specifically, Mr. Darden proffered affidavits and cited the record with regard to the following matters.

This Court believes the perpetrator arrived at the scene of the crime at 5:30 p.m.: "On September 8, 1973, at about 5:30 p.m., a black adult male entered Carl's Furniture Store near Lakeland, Florida." Darden v. Wainwright, 106 S.Ct. 2464, 2467 (1986). Ms. Christine Bass is prepared to affirm without any hesitation that Mr. Darden, who she did not previously know, was outside her house with car trouble from 4:00 p.m. to 5:30 p.m. on the day of the offense. Her testimony to that affect was accepted as true by the magistrate in the 1979 proceeding, but it was deemed unimportant, because, according to the magistrate (but

not this Court), the crime occurred thirty to forty-five minutes later. The new evidence is that the crime did not occur at 6:00, 6:15, or 6:30 p.m. Reverend Sam Sparks is prepared to testify that he and Reverend Sprowls arrived at the scene of the offense at exactly 5:55 p.m. They went in response to a telephone request for assistance from Ms. Turman, which was made after the offense. He will testify that the post-offense telephone request occurred before 5:30 p.m. Rev. David Hess will testify regarding how and when Sparks, Sprowls and Bass realized that Mr. Darden is innocent.

Mr. Darden was thus in front of Mrs. Bass's house when the offense occurred. He is innocent. This proof was available to trial counsel at and before trial, and trial counsel in fact did present Mr. Darden's testimony that he was at Mrs. Bass's residence until approximately 5:30 p.m., and that he did not commit the offense. Trial counsel was aware of Mrs. Bass's corroborative testimony. However, trial counsel did not interview Reverend Sparks or Reverend Sprowls and so failed to learn the significance of Mr. Darden being outside of Mrs. Bass's residence at 5:30 p.m. -- counsel unreasonably and incorrectly decided the offense occurred at 6:00 p.m. to 6:15 p.m., when two ministers would have told them otherwise. Counsels' failure to interview these and other witnesses who went to the scene and whose testimony about the time of the offense make it impossible for Mr. Darden to have been the perpetrator, and counsels' failure to listen to critical pre-trial "time" testimony by police placing the offense at 5:30 p.m., was unreasonable attorney conduct which clearly prejudiced Mr. Darden.

The pre-trial and trial testimony is not inconsistent with Mr. Darden's 4:00-5:30 p.m. alibi. Trial counsel simply was wrong about the time of the crime. The significant elements of the time sequence are: 1) time of the perpetrator's arrival at the Turman store (the scene of the homicide), 2) time of Mr.

Turman's shooting, 3) time the perpetrator left the scene, and 4) time of Mr. Darden's automobile accident near the scene.

Since Mr. Darden was in fact at Ms. Bass's house until 5:30 p.m., he is not guilty if the time of the offense leaves insufficient time for travel to the scene. If the true culprit's arrival at the scene of the offense occurred later than 6:00 p.m., then it is at least conceivable that Mr. Darden could have been at the scene upon leaving Mrs. Bass's house at 5:30 p.m. If someone first heard shots or saw Mr. Turman injured "around six o'clock," the perpetrator would have to have been at the store by 5:45 or 5:50 p.m.

The truth is that no witness who testified would say for sure what time anything happened. Such a critical and dispositive fact received incredibly sloppy (or calculated) treatment. Given Mr. Darden's and Mrs. Bass's information, trial counsel's obligation was to determine what the other evidence revealed with regard to the time of the culprit's arrival at the scene of the offense.

A. Pre-trial "Time"

At a pre-trial evidentiary hearing on a defense motion to suppress evidence, defense counsel questioned George Elliot, an officer with the Polk County Sheriff's Department, about the events leading up to Mr. Darden's arrest. In these pretrial questions, it was established that the officer believed that the offense occurred at 5:30 p.m.:

> Q. All right, sir. Go on then. After Hillsborough County had conveyed this information to you that the driver reportedly was Willie Darden.
>
> A. Yes sir. That they would attempt to pick him up later, that he wasn't there at that time and----
>
> Q. But they would----
>
> A. ----as far as we knew, he was still en route between where he caught a ride to

> this address. I mean, he caught a ride from the Lakeland Lounge and he was still proceeding west the last information we had.
>
> Q. And you got this information about 6:30, an hour after the shooting?
>
> A. Approximately.

(January 9, 1974, pre-trial hearing, pp. 40-41)(emphasis added). Appendix D. The day after this testimony, Mr. Darden filed "Notice of Intention to Claim Alibi," thereby informing the state of the alibi witness (Christine Bass), and that Mr. Darden's whereabouts at 5:30 p.m., at a location at least twenty minutes away from the offense (if you are driving fast), could be proven. Suddenly, "6:30, an hour after the shooting," began to get murkier, but this went unnoticed by defense counsel. Even so, the "trial" time supports what the ministers would now say.

B. Trial "Time"

The trial "time" witnesses were uniformly uncertain about time. The most important witness, however, said that the offense could have been as early as 5:00 or 5:30 p.m., when Mr. Darden was nowhere around. Ms. Turman said:

> Q. All right. Start and tell the Jury what happened on that date.
>
> A. At somewhere between 5:00, 5:30 and 6:00, I can't remember the time, this colored man came--was in the store, as I was--

(R. 200). Incredibly, trial counsel on cross-examination tried to get Ms. Turman to say that the offense occurred at 6:00 p.m, but she would not:

> Q. All right. Now what time did you say that Mr. -- that this man came into your store the first time.
>
> A. Between 5:30 and 6:00.
>
> Q. All right. Do you recall telling Officer Kent but it was six o'clock or possibly a little after?
>
> A. I don't recall saying after.
>
> Q. Is it possible, though, it was six o'clock more than 5:30, close to six o'clock?

A. Its possible.

(R. 233). Had counsel investigated, 5:30 p.m. would have been reinforced, not swept aside. Ms. Turman testified that the perpetrator looked around for a bit, left, and shortly thereafter returned and committed the offense.

Edith Hill, one of Ms. Turman's neighbors, testified, sort of, about the time of the offense. Her "time" could only have been based on post-shooting (not the first "browsing") events, because shots were what made her become aware. Thus, she had no idea when the perpetrator arrived or how long he was present in the store before the shooting:

> Q. About what time was it?
>
> A. Well, it was somewhere around six.
>
> Q. Around 6:00 p.m.
>
> A. I didn't notice the time.
>
> Q. 6:00 p.m.?
>
> A. Pardon?
>
> Q. Afternoon, p.m.?
>
> A. Yes, sir, it was in the afternoon.

(R. 294).

Mr. James Stone testified that he was almost involved in an automobile accident with Mr. Darden, the state's story being that Mr. Darden was fleeing the scene. Try as the state might, Mr. Stone just would not say the times needed to blunt an alibi:

> Q. What were you doing about 6:00 p.m. in the evening?
>
> A. I was on my way back home from the beach with my family, St. Pete Beach.
>
> . . . .
>
> Q. Sir, approximately what time was this accident, to the best of your knowledge?
>
> A. Approximately around six o'clock, somewhere around that time.
>
> . . . .

> Q. Okay. You said around six o'clock when this took place. Did you happen to glance at your watch?
>
> A. I did not have no time on me or my wife either.
>
> . . . .
>
> Q. Would it have been possible for the time to have been, say, 5:30?
>
> A. We had just--like I said, it was around that time, ... It could have been anywhere from 5:30, anything around that time. That's why I say around six.

(R. 308, 313, 324, 326).

Mr. Darden was prepared to prove before the district court that he did not commit the offense, and that trial counsel unreasonably failed to investigate and present his innocence. Four witnesses (Christine Bass, Reverend David Hess, Reverend Sam Sparks, and Reverend Earl Sprowls) provide the evidence, and the affidavits of three of these witness are included in the appendix. (See Appendix E, F, and G.) Their knowledge is reproduced here virtually in total:

1. Christine Bass:

> 1. In October, 1979, I testified in the Federal Court in Tampa, Florida, that Willie Darden was in front of my house from 4:00 to 5:25 p.m. on September 8, 1973.
>
> 2. Other than the time I testified in Federal Court, the time he was brought by the witnesses, including myself, who were waiting outside his trial, in the courthouse in Bartow at his trial, and the afternoon of September 8, 1973, when Mr. Darden came to my door to ask me to call a wrecker for him, I have never seen Willie Darden.
>
> 3. Between 1979 and 1985, I continued to speak from time to time with people about my personal knowledge of Willie Darden's exact location from 4:00 to 5:30 p.m. on September 8, 1973.
>
> 4. In mid-1985, I met Reverend David Hess through his hospital ministry at the hospital where I work. I told him my concerns about the case and we talked several times about it when he would come to the hospital on his patient calls.
>
> 5. Sometime in May or June of 1986, Reverend Hess remembered that his friend Reverend Sam

Sparks had been over to see Mrs. Turman very shortly after the crime had happened. It was then we realized that Reverend Sparks may well be the missing link in the whole chain of events concerning Willie Darden and his being convicted for Mr. Turman's murder. Reverend Hess urged me to get in touch with Reverend Sparks. He said Reverend Sparks is the key to this whole thing.

6. On June 27, 1986, I first made contact with Reverend Sam Sparks. I reached him by telephone and told him what I knew: that Willie Darden was unquestionably in front of my house from 4:00 until very close to 5:30 the afternoon of the murder. After I told him this, Reverend Sparks said, "Then it couldn't be him that committed the crime." He told me he was certain he was at the Turman's store at 5:55 that afternoon and it had to have been more than a half hour after the crime happened that he got to the store.

App. E.

2. Reverend Sam Sparks:

1. My name is Reverend Sam Sparks. I was Pastor of the First Church of the Nazarene in Lakeland, Florida from October, 1973 until June, 1981.

2. On September 8, 1973, at approximately 5:30 p.m., I received a telephone call from Reverend Earl Sprowls, my predecessor at the church. He said something to the effect that Mr. Turman had been shot over at the Turmans' furniture store and asked if I could meet him over at the store at once. I asked him to pick me up.

3. I stood out on the curb and waited for Rev. Sprowls, who lived roughly 5 miles away. Soon, he arrived and we drove over to the Turmans' which was probably another 3 miles.

4. I was conscious of the time because I had a very important appointment at 6:30. I am positive that from the time Rev. Sprowls called me until the time we arrived at the Turmans' store was about 25-30 minutes.

5. When we arrived at the Turmans', I mentioned to Rev. Sprowls that I really needed to be back home by 6:30. I looked at my watch and it was 5:55. I always keep my watch on the correct time and it was correct on that afternoon.

6. At the time we arrived I noticed the Sheriff's car around behind the place as well as 2 or 3 other police cars. I can't say now whether they were police or sheriff's or what. In any case, there were several law enforcement vehicles there and a number of officers.

7. It was pandemonium there at the store when we got there. The police were busy talking to people and all. Our concern was with Mrs. Turman who was stunned and quite beside herself.

8. I don't know whether Mr. Turman was still there at that time or whether he had been taken out.

9. Based on when I got the call from Rev. Sprowls and what time it was when we got over to the Turmans' there is simply no way in heaven the crime could have occurred after 5:30. In fact, I would say it had to be no later than 5:00 or 5:15.

10. I was never interviewed by the police or by the lawyers for Mr. Darden concerning any of this.

11. Frankly, I never knew there was any significance to the information I had until I found out that Mrs. Christine Bass swore that Willie Darden was in front of her house up until 5:30 that afternoon. If this is true, there is absolutely no way he could have committed the crime over at the furniture store. It's just not possible.

12. In May or June of 1986, Reverend David Hess, who performs hospital ministry for the All Saints Episcopal Church, came to see me. He voiced some concerns about whether Willie Darden had actually committed the crime at the Turmans' store and urged me to talk to Mrs. Christine Bass, who he said could definitely place Darden in front of her house at 5:30 on that afternoon. I knew if this was the case, he could not have committed the crimes.

13. I was somewhat hesitant initially because I always assumed Willie Darden had done the crimes. My impression, from the publicity and all and what was presented in the media was that he had confessed, which I am now told was not the case. In short, everybody considered it to be an open-shut case.

14. Shortly after Rev. Hess came to see me, I got a call from Mrs. Bass. She said she was certain Mr. Darden was in front of her house from 4:00 p.m. until 5:25 or 5:30 the afternoon of the murder. I knew then he couldn't have done it because the crime had to have happened some time before 5:30.

App. F.

3. Reverend David A. Hess:

1. My name is Reverend David A. Hess. I serve as Minister for the All Saints Episcopal Church Hospital Ministries.

2. The day after James Turman was shot at his furniture store on September 8, 1973, Reverend Sam Sparks mentioned to me that he had gone by the store right after the crime occurred to check on Mrs. Turman who was a member of his church. I have known Sam Sparks for 43 years.

3. At the time, and for many years after Mr. Turman was killed, I gave little or no thought to what Rev. Sparks had told me, other than feeling what a tragedy it was for the family.

4. In 1985, I began doing hospital calls for All Saints Episcopal Church in Lakeland.

5. Somewhere around the summer of 1985, I met Christine Bass, who works in the Chaplain's office at Lakeland Regional Medical Center.

6. During the course of my visiting the hospitals and my interaction with Mrs. Bass, she told me of her interest in the Willie Darden case.

7. In approximately June of 1986, after several conversations with Mrs. Bass concerning Mr. Darden's whereabouts on the afternoon Mr. Turman was shot, I came to a sudden and urgent realization. I remembered that Rev. Sparks had been by the furniture store right after the crime and it struck me that he might have important information that could help pin down the time of the intrusion and shootings.

8. As soon as I realized this, I contacted Mrs. Bass. I told her, "Chris, why didn't I think of this? Sam Sparks is the key."

9. I then put Rev. Sparks and Mrs. Bass in touch with one another.

10. I have to say, it took a while for me even to entertain the notion that the wrong man might have been arrested and convicted.

11. It was not until I came to understand the import of Mrs. Bass' testimony that I realized it mattered, in any legal sense, that Sam Sparks had been over at the Turmans right after the crime. Other than Mrs. Bass, I was the only person who realized the significance of putting together Rev. Sparks' experience and Mrs. Bass' account of Mr. Darden being at her house at 5:30 until the two of them compared notes just recently. I am thankful that I have been able, after so

many years, to bring together the two individuals having this crucial information and regret that it has taken until now for it all to add up.

App. G.

2. Impermissibly Suggestive Identification Procedures

Mr. Darden pled detailed facts which went completely undenied by Respondent regarding impermissibly suggestive pre-trial identification procedures which created a substantial likelihood of misidentification and which resulted in unconstitutionally unreliable identifications. The state did not deny the allegations, and did not request dismissal of this claim in the district court on any basis.

The facts pled in support of this claim were as follows. The case against the Petitioner was based for all practical purposes solely on the cross-racial eyewitness identification testimony of two witnesses. Both the wife of the victim and an injured teenager who had been shot by the perpetrator of the offense made in-court identifications of the Petitioner as the man who shot Carl Turman. Both of these in-court identifications, as was pled below, were the fruit of impermissibly suggestive procedures which created a substantial likelihood of irreparable misidentification and which resulted in unconstitutionally unreliable identifications. This claim was raised on direct appeal of Mr. Darden's conviction and sentence.

a. MRS. TURMAN

The man Mrs. Turman later identified as the Petitioner was in the family's furniture store for approximately ten minutes before she realized that his intentions were robbery. The lighting in the store was very poor, according to Mrs. Turman's own testimony (R.204), and it is apparent from the record that she paid no particular attention to the man, his appearance, or his actions before the gun appeared. For example, at trial she

could not remember whether the man walked in front of or behind her when she showed him around the store, or in fact whether she even accompanied him on his tour of the store. (R.234-35). She admittedly did not watch him the whole time he was in the store, (R.254), and could not remember any acts not connected to the crime that the man performed while he was looking at furniture. (R.235, 254).

According to Mrs. Turman's testimony, once the man revealed the gun, and his intentions, to her, she was too frightened to even look at him. (R.240, 280). Immediately after the incident, she told one of the investigating officers that it would be hard to identify the man because she was scared to look at him and indeed at one point covered her face with her hands so she would not have to look. (Id.). She also told the officer that she "could not remember what the man looked like or what he was wearing". (Police Report, App. I; see also R. 232, 236).

Five days after the incident, the day after her husband's funeral, Mrs. Turman was asked to attend a preliminary hearing. She was the sole witness (R. 46). Still in a state of shock (R. 257-58), Mrs. Turman was lead into a tiny courtroom with an unknown number of white people present, and one black man sitting at the defense table (R. 221). She actually told her sister she recognized Mr. Darden from the back, seated, which is totally incredible. Next, however, the prosecutor walked over to the Petitioner, pointed at him, and said, "[i]s that the man that did it?" (Transcript of hearing before federal magistrate, 9/12/79, p.151):

THE COURT: Ask her to identify.

MR. MARS: Yes, sir.

Q: Can you see this man sitting here?

* * * [objection overruled] * * *

Q: Is this the man that shot your husband?

A: Yes, sir.

(R. 49-50) (emphasis added). As will be seen, her descriptions at trial of the assailant lent no credence to her suggestively prompted identification.

As if the setting and the cross-racial factor at the "preliminary hearing" was not suggestive enough in itself, the prosecutor actively orchestrated and directed Mrs. Turman's attention to the Petitioner, the only Black man in a room full of white authority figures, as Mrs. Turman's trial testimony regarding her pretrial identification of the Petitioner acutely illustrates:

Q: But he did [the prosecutor] in some way through the record of what was asked and the answers that were given indicate this man here?

A: I would say yes.

* * * *

Q: At that preliminary hearing that Mr. McDaniel and I both have been talking about, in your mind was there any question what Mr. Mars was referring to when he asked the question, "is that the man who killed your husband?"

A: No, there was no doubt in my mind.

Q: As to who he was referring to?

A: Right.

(R. 262, 285).

Mrs. Turman's descriptions of the assailant were markedly opposed to the descriptions of the black man who had the fatal misfortune of wrecking his automobile several miles down the road from the Turman store on the day of the shooting, and that contrast further demonstrates the suggestiveness that destroys the reliability of the identification procedures and taints her identification. That latter man unquestionably was Willie Darden -- he had a wreck -- but the descriptions given by witnesses who stopped at the scene of the accident to lend assistance do not fit the man described by Mrs. Turman. For example, Mrs. Turman testified that the man who shot her husband was "very clean

shaven" (R. 225, 237): James Stone, who stopped to help after witnessing the accident which allegedly occurred only moments after the shooting, testified that Willie Darden had a gray moustache that day (R. 318). Mr. Turman was also sure, although she could not remember the exact color, that the man who shot her husband was wearing a pullover, a t-shirt, with a stripe around the neck and bottom (R. 227): Mr. Stone testified that when Willie Darden got out of his car, according to the state just moments after the crime, he was wearing a plain white shirt with buttons down the front (R. 313).

The several descriptions given by Mrs. Turman of the assailant were also internally inconsistent: as forementioned, she initially told an investigating officer that it would be hard for her to identify the man because she was scared to look while the crime was in progress and indeed at times covered her face with her hands so that she would not have to look (R. 240, 280; supra). She told that same officer that the man was the same height as herself, 5' 6'' (R. 288). In her pretrial deposition, she testified that the man was 5' 8'' or "maybe" six feet (R. 256). When she gave her initial description to the officer, she could not remember whether or not the man wore glasses (R. 227), but by the time of trial she was adamant in her recollection that the man was definitely not wearing glasses (R. 227).

b. PHILLIP ARNOLD

The second witness to identify the Petitioner as the assailant was Phillip Arnold, a sixteen year old. Mr. Arnold had been next door when his mother told him that something had happened to Mr. Turman, and to go and help Mrs. Turman (R. 430). Arnold ran to the store and saw Turman's body in the doorway; when he reached across the body to push open the door, he saw Mrs. Turman and a black man (R. 434). Asking the man to help him, he squatted down to attend to Mr. Turman. (Id). Seconds,

milliseconds, later, Arnold was shot in the mouth (R. 436). After the initial shot, he turned and fled, and never looked back, although he was shot twice more (R. 437). Mr. Arnold saw the man for a period of no more than 20-25 seconds, and even during that period did not have his eyes on the man every moment (R. 494, 497).

Several days after the incident, while Mr. Arnold was still in the hospital with his mouth wired shut, he was visited by police officers who showed him six photographs. Mr. Darden had been arrested the day after the offense, and his photograph as the culprit had been all over the newspapers (R. 446). As Mr. Arnold testified, the purpose of looking at the police photographs was "to identify the person who shot me and Mr. Turman" (R. 449). He immediately excluded four of the six photographs, the four which "just didn't look like him at all," either "too young or just real small" (R. 449). Because Mr. Arnold was still unable to speak due to his injuries, the following exchange between he and the officers was written on a piece of paper:

> "Both of these [other] two look a little like him!"
> DID HE HAVE A MOUSTACHE?
> "I don't think so!"
> WHAT TYPE SHIRT WAS HE WEARING?
> "It was short sleeve. It was something like a red or orange and I think it was a knit material, pale."

(R. 455, 475; Sheriff's Office Supplementary Report, App. I). Mr. Arnold then picked out of the two photos that looked "a little like him" the only one which was identified by a name: the photograph which Mr. Arnold ultimately selected bore a white tag with the name "DARDEN" on it (R. 453, 477), and informed the officers of his selection by writing the arrest date which was also on the photograph on a piece of paper (R. 476). According to his testimony, Mr. Arnold had, by the time this process was

conducted, already read newspaper accounts of the crime and Petitioner's ("DARDEN") arrest (R. 453, 457-59, 476-77).

Mr. Arnold was not allowed to testify before the jury regarding his questionable pre-trial identification of the Petitioner, but rather told the jury only that he recognized the Petitioner as his assailant. The evidence is virtually unrebuttable that this in court identification had its sole genesis in the impermissibly suggestive and irrevocably tainted photo array process, but the jury was not informed of these questionable procedures.

The inconsistencies between Arnold's descriptions, Mrs. Turman's, and those of other witness's likewise add credence to Petitioner's claim that Arnold's initial and in court identifications were the product of impermissibly suggestive procedures and were therefore irrevocably unreliable. When he made his initial identification, by selecting the photograph conveniently labeled "DARDEN," he "didn't think" that the man he saw at the store had a moustache; in his pretrial deposition, he was considerably surer that the man "had no hair on his face" (R. 498). At trial, however, after James Stone gave his testimony (supra), Arnold could not say for sure whether or not the man had a moustache, because "it was a very thin one" (R. 497). Arnold also testified that the man he saw had an unusually long face (R. 443): Mrs. Turman, on the other hand, testified that the man she saw had the type of fat face consistent with a heavyset person (R. 237).

The only detail of any of the descriptions of the assailant or Willie Darden that remained constant throughout and consistent with the testimony of other witnesses was his race: everyone agreed that the man was indeed "colored". The testimony of the officer who arrested the Petitioner late that night, in Tampa, is particularly telling in regard to the accuracy and specificity of Mrs. Turman's description of the man who shot her husband: when

asked if the man he arrested, Willie Darden, fit the physical description given by Mrs. Turman, the officer replied, "[y]es. The dark colored automobile, the time element, the car crash . . . just led me to believe this possibly was him" (R. 82). It is painfully clear that the "physical description" given by Mrs. Turman would have fit any Black man unfortunate enough to have been anywhere near the scene that day. It is equally clear that her and Arnold's identifications of the Petitioner were irrevocably tainted by the incredibly unreliable and racially suggestive procedures employed, and deprived the Petitioner of his rights under the eighth and fourteenth amendments.

C. The District Court's Action

There has been no merits resolution of the claims presented in this capital habeas corpus appeal. The district court, without analysis of the claims, without a hearing on the merits, and without allowing Mr. Darden an opportunity to respond to the State's allegations of writ abuse, dismissed the petition solely because it was not Mr. Darden's first petition for writ of habeas corpus. Appendix B. Activity in the district court was all "on paper." Mr. Darden was scheduled to be executed October 21, 1986.

The first paper filed in the district court was a request by the State not to have to file any paper, and the basis for that request was that Mr. Darden was about to file a petition for writ of habeas corpus which was not his first. In a pleading received by the Clerk October 15, 1986, at 8:56 a.m., and entitled Motion to Suspend Application of Local Rule 4.17 or, in the Alternative, Motion to Utilize Previous Court Files as Advance Appendix, the State posited:

> The unique and particular posture of this case is such that regardless of the grounds contained in an anticipated petition for habeas corpus, the respondent will move to dismiss the petition as either a successive petition or as one representing an abuse of

> the writ. See Darden v. Wainwright, Case No. 85-1420-CIV-T-10, order filed September 3, 1986. Argument in support of a motion to dismiss will be devoted to legal concepts and authorities and will in no way be directed to the state court record.
>
> It is accordingly suggested that to the extent that the court has the discretion contemplated in Rule 4.17(a), the application and use of an advance appendix would be neither feasible nor necessary.

ROA (Vol. 2) - (Doc. 3) - (p. 3) (emphasis added). This motion, granted the next day, foreshadowed the district court's predicate for dismissal. Rule 4.17 is purposed and in fact provides for quite expedited handling of capital cases under warrant, and its unnecessary suspension provided super-expedition, relieving the State (and the district court) of the necessity of compiling and reviewing State "collateral proceedings including the appeal of post-trial motions," and relieving the State of its responsibility to "file an answer to the petition immediately following receipt of the served petition . . . ." Id. There were six days before execution.

On October 15, 1986, the same day but after the State asked not to be required to file any state court paper, Mr. Darden lodged his petition for writ of habeas corpus in the district court. Upon State court exhaustion, the petition was filed at 1:57 p.m., October 16, 1986. ROA (Vol. 1) - (Doc. 1) - (p. 1). Two hours later, the State filed Motion to Dismiss; Motion to Deny Certificate of Probable Cause; and Motion to Deny Application for Stay of Execution, a pleading which discussed only two of the three claims raised in the petition. Summary dismissal was requested because of an asserted but incongruous potpourri of procedural default, successor status, and abuse of the writ. ROA (Vol. 2) - (Doc. 7). The State "relied" upon those portions of the just-completed State record which the State chose to provide the district court (the Florida Supreme Court decision from Rule 3.850 and state habeas), and ignored those parts deemed unnecessary and not filing-worthy a la the Motion to

Suspend Application of Local Rule 4.17 -- the State neglected to provide the State circuit court's order which specifically did not find abuse on the ineffective assistance of counsel claim. That state court record order was not before the district court, due to super-expedition. Mr. Darden's claim that the identification procedures violated due process was not addressed in the State's Motion to Dismiss.

Forty-two (42) minutes after the State's filing, and without notice, a two-page order dismissing the petition was typed, signed and filed, along with an order relieving the State of compliance with Rule 4.17, M.D. Fla. Rules. ROA (Vol. 2) - (Doc. 8 and 9). The order dismissing all three claims stated in relevant part:

> Although the arguments and contentions in support of these claims are somewhat different, all three were presented in the original petition. It seems abundantly clear, therefore, that if the filing of the second petition constituted an abuse of the writ, as it did, then the submission of the third petition is, a fortiorari, an even greater abuse.

ROA (Vol. 2) - (Doc. 8) - (p. 2). Even the claim upon which the State had written nothing (improper identification) was dismissed as an abuse. The Eleventh Circuit Court of Appeals affirmed, but "did not agree with the district court's reasoning . . . ." Darden v. Dugger, 825 F.2d 287, 292, fn. 15 (11th Cir. 1987). The reasoning of the appellate court is as suspect, and provides the basis for this court granting the writ.

II. REASONS FOR GRANTING THE WRIT

THE SUMMARY DISMISSAL OF MR. DARDEN'S PETITION DECIDED FEDERAL QUESTIONS IN CONFLICT WITH THIS COURT'S DECISIONS IN SANDERS V. UNITED STATES, 373 U.S. 1 (1963); KUHLMANN V. WILSON, 106 S.Ct. 2616 (1986); BLACKLEDGE V. ALLISON, 431 U.S. 75 (1977); TOWNSEND V. SAIN, 372 U.S. 293 (1963); AND STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), AND IN CONFLICT WITH 28 U.S.C. SECTION 2244(B), 28 U.S.C. SECTION 2254, AND RULE 9(B) OF THE RULES GOVERNING SECTION 2254 CASES

The lower court erred regarding critical fact and law determinations which prevented Mr. Darden from presenting evidence, in any form, that demonstrates that trial counsel was ineffective in unreasonably failing to interview critical time of the offense witnesses whose testimony would have presented a reasonable probability of a different result at guilt/innocence or sentencing. The lower court also erred as a matter of fact and law by determining that Mr. Darden had abused the writ by raising the claim of unduly suggestive identification procedures in a second or subsequent habeas corpus action. In both instances, the lower court ignored and/or misapplied the law governing habeas corpus actions as promulgated by Congress and as applied in this Court's decisions, and Mr. Darden is entitled to Court's review. Rule 17.1(c), Rules of the Supreme Court of the United States.

A. Mr. Darden's Claim Of Innocence And Ineffective Assistance Of Counsel Required Evidentiary Development.

There is no question but that Mr. Darden's claim of ineffective assistance of counsel would have entitled him to an evidentiary hearing had it been made in an original petition for writ of habeas corpus. As will be shown, an evidentiary hearing was necessary despite the fact that this claim arose in a third petition, and the summary dismissal and its affirmance reflects a policy of rigid and overbroad application of res judicata

principles where they do not belong. Sanders v. United States, 373 U.S. 1 (1963)("The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.")

1. The pleadings entitled Mr. Darden to an evidentiary hearing.

Mr. Darden pled with extreme specificity that there were four witnesses who knew and would testify that at the time of the offense he was elsewhere, that trial counsel acted unreasonably by failing to discover this information, and that there was a reasonable probability that but for the unreasonable omissions that the result in this case would have been different. These allegations stated grounds for relief under this Court's standards governing claims of ineffective assistance of counsel under the Sixth and Fourteenth Amendments. Strickland v. Washington, 466 U.S. 668 (1984).

Prejudice is simple -- this was a close case. Two white victims "identified" Mr. Darden, after suggestive identification procedures. See Section II, B, infra. Mr. Darden testified he did not commit the offense. The credibility resolution was catalyzed by what all have agreed was egregious prosecution closing arguments. Corroboration of Mr. Darden's testimony would have made a difference.

The allegations are unrefuted:

(1) The police, who unlike lay persons, are trained to notice things like time of offense, testified pretrial that the shooting occurred at 5:30 p.m. Counsel was unreasonable in assuming a 6:30 offense time.

(2) Ms. Turman's pastor was telephoned by victim Mrs. Turman at or before 5:30 p.m., was told by her that her husband had been shot, and the pastor then travelled to the scene, arriving at 5:55. Trial counsel knew pretrial that Reverend Sprowls and Reverend Sparks arrived to aid Ms. Turman, but counsel unreasonably failed to interview "about time" these and

other witnesses who were at the scene post-offense. These witnesses show how unreasonable trial counsel's belief of a 6:30 offense time was, and show that if Mr. Darden was somewhere other than the offense scene at 5:30, he is innocent.

The petition fortuitously answers the "so what?" response to Ms. Bass telling trial counsel in 1974 that Mr. Darden was at her house at 5:30. The new witnesses (and the police pretrial) place the offense at the exact time Mr. Darden was having car trouble, twenty minutes away from the killing. Mr. Darden requested an evidentiary hearing to demonstrate that trial counsel's "so what" response in 1974 was patently unreasonable, and resulted from an unreasonable attorney failure to learn easily discoverable facts about "time."

Trial counsel has two obligations where alibi is the only defense, as counsel has acknowledged it was: (1) find out the time of the offense; (2) find out where the client was. Because of the unreasonable failure to find out the time of the offense, Mr. Darden was prejudiced. Counsel's role is to "assure that the adversarial testing process works to procure a just result under the standards governing decisions." Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). At the heart of effective representation is the independent duty to investigate and prepare. Goodwin v. Balkcom, 684 F. 2d 794, 805 (11th Cir. 1982). Investigation into alibi in Mr. Darden's case was the only avenue of investigation, as stated by trial counsel. From the moment Mr. Darden first met with his attorneys until this day, Mr. Darden has consistently posited his innocence and has actively set out to prove it. "Alibi" requires particularly taxing but necessary investigation by counsel, particularly in a case where no one wishes to help. This was an explosive case, and witnesses were not flocking to Mr. Darden's defense. Even the witnesses whose affidavits accompany the instant habeas petition assumed Mr. Darden was guilty, and did not realize the

significance of the information they possessed. For the adversarial system to work, alibi investigation had to be reasonably conducted, after proper counsel analysis of the state's evidence.

This overarching duty of counsel has been emphasized repeatedly by the courts. See Weidner v. Wainwright, 708 F.2d 614, 617 (11th cir. 1983) (Counsel was ineffective where "pretrial investigation into [defendant's] most plausible defense was woefully inadequate."); House v. Balkcom 725 F.2d 608, 617-618 (11th Cir. 1984) cert. denied, 105 S. Ct. 218 (1984) ("failure to investigate the facts is unconscionable and falls below the level of performance by counsel required by the sixth amendment... Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps the most critical stage of a lawyer's preparation."); see, also, Porter v. Wainwright, 838 F.2d 1410 (11th Cir. 1986) (case remanded for evidentiary hearing on claim of ineffectiveness for failure to investigate mitigating character evidence); Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985) ("... at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."); United States v. Baynes, 687 F.2d 659 (3rd Cir. 1982) ("... the courts must continue to insist that trial counsel, at the very least, investigate all substantial defenses available to a defendant.") In fact, the unique urgency of alibi investigation has been specifically noted and has provided the basis for habeas corpus relief. Bell v. Georgia, 554 F.2d 1360 (5th Cir. 1977) (counsel ineffective for failure to contact potential alibi witnesses and failure to investigate alibi defense); Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984) (counsel's "investigation fell short of what a reasonably competent attorney would have done" where counsel did not contact alibi witnesses); Wilson v. Cowan, 578 F.2d 166, 168

(6th Cir. 1978) ("The entire prosecution case consisted of personal identification of appellant by the two victims. The robbers were unknown to the victims... This left no defense at all except two potential alibi witnesses... [t]his record requires us to hold that ineffective assistance of counsel deprived appellant of his only defense... it also deprived the jury of the opportunity to hear arguably vital evidence which should have been weighed in the balance against the identification testimony.") (emphasis added)

Mr. Darden's claim was not so "palpably incredible" or so "patently frivolous or false" as to warrant summary dismissal, Blackledge v. Allison, 431 U.S. 63, 75-76, 78, 81-83 (1977), the detailed factual allegations should have been taken as true, see Townsend v. Sain, 372 U.S. 293, 312-13 (1983), and the district court was required to conduct an evidentiary hearing. Id. The district court however summarily dismissed the claim as an abuse of the writ, and the court of appeals affirmed that dismissal on the much different basis that the claim was successive. See Darden v. Dugger, 825 F.2d 287, 292, fn. 15 (11th Cir. 1987). Both bases are discussed, infra, but the real reason for the appellate court's affirmance of the dismissal was that that court simply did not believe the allegations in the petition, did not believe what the ministers said, and did not wish to examine the claim for what it claimed was the "sixth time."6/

The lower court spent little time trying to refute the specific contentions that should have been accepted as true,

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6. As explained in footnote 4, supra, the Eleventh Circuit has never addressed the allegations made here, and, in fact, only the magistrate ever critically wrote about the previously raised and different ineffective assistance of counsel claim. Thus, while the lower court opinion asserts that this claim has been "exhaustively litigated," Darden v. Dugger, 825 F.2d at 293, it has not been litigated at all in one sense, and not exhaustively, or five times, in any sense.

Blackledge, supra, and was wrong in its recitation of the few facts it chose to discuss:

> Petitioner has the burden of showing this court that the ends of justice requires reconsideration of this claim. Petitioner offers two affidavits that support his alibi. The affidavits support the alibi that petitioner could not have been in two different places at the same time. One of the affidavits stated he was at the crime scene at 5:55 p.m. and opined that the crime was committed between 5:00 p.m. and 5:15 p.m. He concluded that petitioner was innocent since petitioner was reported to be in front of Christine Bass' house with car trouble from 4:00 p.m. to approximately 5:30 p.m. The second affidavit corroborated the contention that the crime was committed between 5:00 p.m. and 5:15 p.m.
>
> . . . .
>
> The overwhelming evidence of the time of the commission of the crime is contrary to the affidavits submitted by petitioner. Mrs. Turman, Mrs. Hill and Phillip Arnold all testified that the crime occurred at approximately 6:00 p.m. John Stone witnessed petitioner's automobile wreck at about 6:00 p.m. Mary Simmons offered petitioner a ride to Tampa after the 6:30 p.m. news. The call reporting the homicide was received by the Lakeland Police Department at 6:31 p.m. The accident was reported to the Hillsborough County Police Department at 6:32 p.m. After reviewing the record in its entirety we conclude that petitioner has failed to meet his burden of showing that the ends of justice require a federal court to revisit this claim for a sixth time. The district court, within its sound discretion, properly dismissed this claim without a hearing.

Darden v. Dugger, 825 F.2d at 293-94 (footnotes omitted). As revealed in the statement of the facts, Section I, B, 1, (a) and (b), supra, the court of appeals was quite simply wrong when it concluded that "the overwhelming evidence of the time of the commission of the offense is contrary" to the affiant's conclusions that the offense occurred at or before 5:30 p.m. This Court wrote that it started at 5:30 p.m. Darden v. Wainwright, 106 S.Ct. 2464, 2467 (1986). Ms. Turman said 5:00, 5:30, or 6:00 p.m. (R. 233). The police said 5:30 p.m. Appendix D. Ms. Hill, who "didn't notice the time," said it was "in the afternoon," "somewhere around six." (R. 294). Ms. Hill

only became aware of the offense when Phillip Arnold was shot, which occurred long after "a black male entered Carl's Furniture Store. . . ." Darden, supra; 106 S.Ct. at 2467. Mr. Stone testified that the wreck "could have been anywhere from 5:30, anything around that time," but that he "did not have no time on me or my wife either." (R. 308, 313, 324, 326). Phillip Arnold said it was "about six o'clock," (R. 431) when he was shot, which says nothing about when the black male first entered the store to browse. The call reporting the homicide to one investigator occurred at 6:31 p.m., and when he arrived on the scene at 6:34 p.m., the body had already been removed by paramedics, and other auxiliary men, officers, and lab technicians were already there "around 6:30, an hour after the shooting." January 9, 1974, pretrial hearing, Appendix D.

In short, the record actually supports rather than being "overwhelmingly . . . contrary to the affidavits submitted by petitioner." Darden v. Dugger, 825 F.2d at 293-94 (footnotes ommitted). The lower court simply chose not to believe the ministers, did not order an evidentiary hearing, and adopted a view of the record that conflicts with this Court's view of the record. This was error under Townsend, Blackledge, Sanders, and Strickland, supra. The merits ruling that the affidavits and new evidence did not "alter what has been determined regarding counsel's performance as a matter of law," Darden v. Dugger, supra, 825 F.2d, footnote 19, was improperly decided as a matter of law, and was predicated on factual errors.

2. The district court dismissal of the petition was a patent abuse of discretion.

Without regard to whether Mr. Darden might be entitled to an evidentiary hearing on this claim, the district court summarily denied the petition applying the nonsequitur that since, in that court's view, the claim had been raised before, and since the

second petition had been properly dismissed as an abuse of the writ, the instant petition was an abuse of the writ. The district court was in error in its blanket determination that the claim had been previously raised, and in the legal conclusion that a second or subsequent petition is necessarily an abuse and automatically subject to dismissal. The Eleventh Circuit's affirmance of that decision was error, and contrary to this Court's precedents.

A denial of an application for habeas corpus is not res judicata with respect to subsequent applications. Sanders v. United States, 373 U.S. 1, 7 (1963), 28 USC sec. 2244, and Rule 9(b), which codifies Sanders, provides the starting point for analysis of second or subsequent petitions, an analysis steeped in traditional notions of equity, and specifically intended to prevent only vexatious withholding or repetition of claims and habeas corpus actions. Sanders, 373 U.S. at 18.

Claims contained in second or subsequent petitions may be dismissed without merits consideration if the State specifically demonstrates and the petitioner fails to refute one of the following two matters: that the ground for relief is not a new ground, it was previously determined on the merits, and the ends of justice will not be served by revisiting the claim; or the claim is one not previously presented, and the failure to present the claim earlier is an abuse of the writ. Rule 9(b); Sanders. Old claims presented again are "successive;" new claims not previously presented may be "abusive":

> The terms "successive petition" and "abuse of the writ" have distinct meanings. A "successive petition" raises grounds identical to those raised and rejected on the merits on a prior petition. . . . The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus.

Kuhlmann v. Wilson, 106 S. Ct. 2616, 2622 n.6 (1986)(emphasis added).

Certain important rules accompany, and insulate petitioners from the extraordinary use of invocation of a "procedural successor" as opposed to a "merits" dismissal of a habeas corpus petition. First,

> [T]he burden is on the Government to plead abuse of the writ. "[I]f the Government chooses not to deny the allegation or to question its sufficiency and desires instead to claim that the prisoner has abused the writ of habeas corpus, it vests with the government to make that claim with clarity and particularity in its return to the order to show cause." Price v. Johnston, 334 U.S. 206, 291-92 (1948). The Court [in Price] reasoned that it would be unfair to compel the habeas applicant . . . to plead an elaborate negative.

Sanders, 373 U.S. at 10-11. Upon proper pleading by the State, petitioner must show, and must be provided the opportunity to show, that the interests of justice justify rehearing an "old claim," or that a new claim is not abusive. With regard to abuse, the petitioner should be permitted to demonstrate through evidence that the new claim was not earlier known and withheld, not earlier abandoned, or not for some other unjustifiable reason not presented. The gravaman is whether knowing conduct purposed to vex, harass, delay, or cause piecemeal litigation has occurred. Sanders, 373 U.S. at 17-18.

With regard to claims previously raised, a plurality of this Court believes that "the 'ends of justice' require federal courts to entertain such petitions only when the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Kuhlmann v. Wilson, 106 S. Ct. 2616, 2627 (1986). And "no matter into which classification a successive petition falls, a district judge always has the discretion -- and sometimes the duty -- to reach the merits." Potts v. Zant, 638 F.2d 738, 741 (5th Cir. 1980).

The district court dismissed Mr. Darden's habeas corpus petition because Mr. Darden had filed previous petitions, and for no other reason -- the Court simply applied hard and fast res

judicata "law." The attempted rationale was (1) that Mr. Darden had raised the claims before, (2) a second habeas corpus petition had been properly dismissed as abusive, and thus (3) "[i]t seems abundantly clear, therefore, that if the filing of the second petition constituted an abuse of the writ, as it did, then the submission of the third petition is, a fortiorari, an even greater abuse." ROA (Vol. 2)-(Doc. 8)(p. 2). The district court erred by mixing and confusing "successive-ends of justice" law with "abuse of the writ" law, by not analyzing Mr. Darden's allegations supporting the absence of bad faith abuse and presence of "justice," and by not allowing Mr. Darden the opportunity to demonstrate that he was entitled to merits consideration, given the equities.

The district court's concern that the claims had been raised before was completely bereft of "interest of justice" consideration. The court's reliance on the fact that an earlier petition had been dismissed as "abusive" was baffling. The appellate court luckily did "not agree with the district court's reasoning," but did "agree that it was within the district court's sound discretion to dismiss," because of the appellate court's conclusion that "[t]he allegation of time error in the affidavits presented does not alter what has been determined regarding counsel's performance as a matter of law." Darden v. Dugger, supra, 825 F.2d at footnotes 15 and 19. The appellate court, however, was itself wrong in its analysis of the facts and law.

3. Under successive or abuse of the writ analysis, the Eleventh Circuit's affirmance of the district court's action did not cure the district court's abuse of discretion.

a. Even if the claim had been raised before, it should have been heard again in the interest of justice.

Controlling weight may be given a final-denial of a prior application only if the same ground was presented in it, it was determined adversely to the petitioner on the merits, and only if the ends of justice will not be served by reaching the merits of the subsequent application. Sanders v. United States, 373 U.S. at 15; Rule 9(b). The district court judge did not consider whether "justice" should play any part in his disposition of the claim, and it played no part. He also did not determine correctly whether the precise claim presented had been ruled upon before. Consequently, his action was an abuse of discretion, and the case must be remanded to him.

The court of appeals affirmed, however, after a completely erroneous application of the ends of justice test. Even though ineffective assistance respecting alibi had been raised in 1979, the facts now presented were not presented then, and the petitioner offered to prove that the failure to present the information sooner was not the result of any bad motive, mistake, or inexcusable neglect. The appellate court simply did not believe the new evidence, despite the fact that its truth has never been tested. The court's decision that the claim had been exhaustively litigated was wrong, see Section I, A, 2, supra, the court's analysis of the record facts was wrong, see Section I, B, 1, (a) and (b), supra, and, consequently, the court's analysis of "ends of justice" was wrong.

Even under this Court's plurality opinion in Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986), which proposes a more stringent test for ends of justice than ever before, Mr. Darden's

allegations should invoke the "ends of justice" bar to dismissal. He has presented more than a "colorable showing of factual innocence" in conjunction with a sixth amendment claim of ineffective assistance of counsel, which "require[d the] federal court[] to entertain [the] petition[]. . . ." Id., 106 S.Ct. at 2627.

b. This claim in fact has not been previously presented and ruled upon, but Mr. Darden did not intentionally withhold it from any earlier petition.

This claim was not presented in 1979. An attorney preparing an alibi defense must know 1.) when the crime occurred, and 2.) where his client was at the time of the crime. The 1979 petition challenged counsel's conduct of not discovering where Mr. Darden was at 6:00-6:30 p.m., the second alibi factor. The current petition challenges counsel's failure to know alibi factor one: when the crime occurred. No federal court has heretofore been presented with the claim that Mr. Darden was not at the scene at 5:30 p.m., that the crime occurred at 5:30 p.m., or before, and that counsel was ineffective for not knowing the 5:30 p.m. offense time.

The court of appeals' protestations that this claim has been exhaustively litigated is error. See Section I, A, supra. There has been litigation about alibi, and ineffectiveness concerning alibi, but that litigation has not been concerned with alibi factor one, time of the offense. The new facts go to that factor. Thus, the instant claim "is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ," 28 U.S.C. sec. 2244(b) (1982). Mr. Darden has presented a new "gound for relief" not previously adjudicated "on the merits," Rule 9(b), and, consequently, ends

of justice is not the proper analysis.7/ The dismissal was contrary to federal law.

This Court should grant certiorari to address whether the successive bar is a generic one, and whether new evidence in support of a part of an ineffective assistance of counsel claim not litigated before can be summarily rejected. The fact that ineffective assistance of counsel has been litigated does not mean that critical new facts in support of a different ineffective assistance claim should be summarily rejected, and not heard.

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7. The question should be whether Mr. Darden intentionally withheld the new minister evidence claim from a previous petition, or otherwise abused the writ by not heretofore presenting the new available evidence. See Section II, A, 2, supra, and II, B, 2, infra. He pled that he did not know of this evidence before, that his post-conviction attorneys did not know, that there was no inexcusable neglect, and that it was presented upon its discovery.

B. Mr. Darden's Claim Of Impermissibly Suggestive Identification Procedures Should Have Been Addressed On The Merits.

The district court dismissed the entire petition as an abuse of the writ, and no opportunity was presented for Mr. Darden to prove his averments that the claim was not deliberately withheld from an earlier petition, and that he harbored no intention to vex, harass, or delay. The court of appeals incorrectly concluded that the claim had been raised in an earlier petition, had been abandoned, and that thus petitioner's conduct was vexatious. In addition, the court of appeals incorrectly decided that since this Court had found overwhelming proof of guilt (which included, oddly, the very eyewitness testimony being challenged), there was no need to address the claim.

Certiorari should be granted because Eleventh Circuit law regarding abuse of the writ flies in the face of years of precedent from this Court. Furthermore, the court of appeals was simply wrong when it held that the Phillip Arnold identification issue had been earlier raised and abandoned. Finally, because this claim involves a colorable claim of innocence in fact, the equities required hearing the claim.

1. The claim is not palpably incredible.

This claim is a real and substantial one which, if this were an original habeas corpus action, would have to be addressed by the federal district court and the court of appeals. See Blackledge, supra. The identification of Petitioner through Ms. Turman's and Phillip Arnold's testimony is, for all practical purposes, the sole predicate for Mr. Darden's conviction and death sentence. See Darden v. Wainwright, 699 F.2d. 1031, 1040 (11th Cir. 1983) (Identification testimony was "[t]he evidence which convicted Darden....") (Clark, J., dissenting). Ms. Turman had said to police that she would not be able to identify the

perpetrator, before the impermissibly suggestive procedures occurred. Mr. Arnold from his hospital bed chose Mr. Darden from photographs presented by police -- "DARDEN" and his two day earlier date of arrest was on the chosen one, just as it had been in the newspapers. These and other grossly irregular procedures, stark inconsistencies between pre-trial and trial descriptions of the culprit, and the fact that Mr. Darden did not fit the pre-identification procedure description of the perpetrator, have led various judges and justices to seriously question Ms. Turman's and Phillip Arnold's testimony, even when the issue was not raised as a due process violation. See Darden v. Wainwright, 106 S.Ct. 2464, 2481 (1986) (Blackman, J., dissenting). ("While the question whether the various in-and-out-of-court identifications ought to have been suppressed is not now before the Court, my confidence in their reliability is nonetheless undermined by the suggestiveness of the procedures by which they were obtained...."); Darden v. Wainwright, 699 F.2d. 1031, 1043. (11th Cir. 1983) (Clark, J., dissenting) (after outlining the impermissible procedures, concluding "Darden's due process rights were not well guarded in this case.")

Eyewitness identification testimony must be suppressed if it results from an unreliable suggestive identification procedure that violates due process by creating a substantial likelihood of mistaken identification. Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968). The fact that the procedure is unnecessarily suggestive does not, without more, require suppression: it is the reliability of identification testimony, viewed in the totality of the surrounding circumstances, which controls. Manson v. Braithwaite, 432 U.S. 112 (1977).

Unreliability leading to a danger of mistaken identification must be evaluated under the totality of the circumstances surrounding the challenged identification procedure. Stovall v.

Denno, 388 U.S. 293 (1967). Since the time of Petitioner's trial and direct appeal, the Supreme Court has identified certain factors which are appropriate for consideration in making the determination whether a particular identification procedure creates a substantial likelihood of mistaken identification. Those factors, set out by the Neil v. Biggers Court and reaffirmed after Mr. Darden's appeal in Manson v. Braithwaite, supra, are: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of the witness's prior description; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. These factors are to be weighed against the "corrupting effect of the suggestive identification itself." Manson at 114.

These factors are not exclusive: the Stovall "totality of the circumstances" approach is still very much the law. "The 'central question. . .[is] whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.'" Manson at 106, quoting Neil at 199. The character of the identification procedure is still also an important consideration: although an unnecessarily suggestive procedure, without more, will no longer result in a per se exclusion of the eyewitness testimony, the "totality of the circumstances," including those specific factors identified in Manson and Neil as indicia of reliability, must be weighed against "the corrupting effect of the suggestive identification itself." Manson at 114.

It is thus a matter of degree--the more unnecessarily suggestive the identification procedure, the more likely the chance of irreparably mistaken identification which would require exclusion of the fatally unreliable testimony. Although "[r]eliability of properly admitted eyewitness identification,

like credibility of other parts of the prosecution's case, is a matter for the jury. . . . in some cases procedures leading to eyewitness identification may be so defective as to make identification constitutionally inadmissable as a matter of law." Foster v. California, 394 U.S. 440, 442 n.2 (1969). This is such a case.

a. Ms. Turman

It is hard to imagine more unnecessarily suggestive identification procedures than those employed in Petitioner's case, or more corrupting effects. Ms. Turman in particular was effectively deprived of any choice in her identification of the Petitioner by the leading and suggestive procedures employed by the state and approved by the trial court. Five days after the incident, the day after her husband's funeral, Ms. Turman was asked to attend a preliminary hearing. She was the sole witness. (R.46). Still in a state of shock, (R.257-58), Ms. Turman was led into a tiny courtroom with an unknown number of white people present, and one black man sitting at the defense table. (R.221). The prosecutor walked over to the Petitioner, pointed at him, and said, "[i]s that the man that did it?" (Transcript of hearing before federal magistrate, 9/12/79, p.151):

THE COURT: Ask her to identify.

MR. MARS: Yes, sir.

Q: Can you see this man sitting here?

* * * [objection overruled] * * *

Q: Is this the man that shot your husband?

A: Yes, sir.

(R.49-50) (emphasis added). Under such contrived and deliberately suggestive circumstances, Ms. Turman's identification of any black man in the Petitioner's position was virtually inevitable.

The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. Stovall at 302; Foster at 443. The effect of such a procedure is to tell the witness "this is the man who did it," and demand that he or she agree. See Foster, supra, at 443 ("In effect, the police repeatedly said to the witness, 'this is the man'"). Although confrontations of this type have been upheld when the record shows that, under the exigencies of the surrounding circumstances, this type of confrontation was imperative, see Stovall at 302 (witness in hospital on verge of death), and when, under the totality of the circumstances, there are sufficient independent indicia of reliability of the identification testimony, this is not the case here. The type of suggestive one-on-one procedure employed here was wholly unnecessary: the Petitioner had been in custody since several hours after the crime occurred, and there is no indication that the witness would be unavailable anytime in the near future. There clearly was ample opportunity to conduct a proper lineup, or a carefully controlled, counseled photo array procedure. The only inference that can be drawn from the state's deliberate employment of this type of inherently suggestive and unreliable procedure is that the state was aware of the improbability of a positive identification and attempted to procure one through any means necessary, no matter what the cost. As in Foster, supra, "[i]n the present case the pretrial confrontations clearly were so arranged as to make the resulting identification virtually inevitable." Id at 443.

The state's choice here of the preliminary hearing, a step in the process of charging the Petitioner with the murder of her husband, as the forum for Ms. Turman's confrontation with the suspect was in itself sufficient to call her attention to the expectation of everyone in the courtroom that she would identify the Petitioner: the fact that the Petitioner was the only black

man in the courtroom could only have made this result inevitable. Moreover, the inherent suggestiveness of such a procedure as was employed here was further aggravated by the deliberate conduct of the state and the court: the court's pointed introduction to the procedure-- "ask her to identify," (R.49)-- demonstrated to Mrs. Turman that the court expected her to identify the Petitioner; the state's leading questions -- "can you see this man sitting here?"; "Is this the man that shot your husband?" (R.49)-- left her with little or no choice but to choose him. As in Foster, supra, the "suggestive elements in this procedure made it all but inevitable that [Turman] would identify petitioner whether or not he was in fact 'the man.'" Id at 443.

The identification of the Petitioner by Ms. Turman, viewed under the totality of the circumstances and weighed against "the corrupting effect of the suggestive identification itself," gave rise to a more than substantial likelihood of mistaken identification. The highly suggestive and improper confrontation procedure orchestrated by the state weighed heavily in the favor of suppression, standing alone, but other circumstances make it apparent that Ms. Turman lacked the opportunity and ability to make an accurate identification. When analyzed in light of the factors identified in Neil and Manson, it becomes obvious that her testimony was inherently unreliable, and that its admission therefore violated the Petitioner's due process rights.

The first factor identified in Neil is the witness's opportunity to observe. Although her testimony indicated that the man Ms. Turman later identified as the Petitioner was in the family's furniture store for approximately ten minutes before she realized that his intentions were robbery, it is also apparent from her testimony that she paid no particular attention to the man, his appearance, or his actions before the gun appeared. The lighting in the store was very poor, according to Mrs. Turman's own testimony (R.204), and at trial she could not remember

whether the man walked in front of or behind her when she showed him around the store, or in fact whether she even accompanied him on his tour of the store. (R.234-35). She admittedly did not watch him the whole time he was in the store, (R.254), and could not remember any acts not connected to the crime that the man performed while he was looking at furniture. (R.235, 254).

The second Neil factor, closely related to the first, is the witness's degree of attention. Applied to the instant case, this factor raises the more significant question of whether Ms. Turman took advantage of her opportunity to observe. It is apparent from her testimony that until the man pulled out a gun, she had no reason to and in fact did not closely observe the man. Although she did indeed have such reason once this occurred, according to her testimony, once the man revealed the gun, and his intentions, to her, she was too frightened to even look at him. (R.240, 280). Immediately after the incident, she told one of the investigating officers that it would be hard to identify the man because she was scared to look at him and indeed at one point covered her face with her hands so she would not have to look. (Id.). She also told the officer that she "could not remember what the man looked like or what he was wearing". (Police Report, App.I; see also R.232, 236). It is thus apparent that Mrs. Turman deliberately did not focus her attention on the Petitioner in such a way so as to facilitate a later identification.

The third Neil factor, the accuracy of the witness's prior identification of the suspect, weighs heavily in favor of Petitioner's position when applied to the instant facts. Ms. Turman initially could not even describe the man she saw: she told the first officer to interview her that it would be hard for her to identify the man because she was scared to look while the crime was in progress and indeed at times covered her face with her hands so that she would not have to look. (R.240, 280). Her

subsequent descriptions of the assailant so deviated from the Petitioner's actual appearance at the time of his automobile accident as to render them, and her ultimate identification, virtual nullities. For example, Ms. Turman testified that the man who shot her husband was "very clean shaven" (R.225, 237): James Stone, who stopped to help after witnessing the accident which allegedly occurred only moments after the shooting, testified that Willie Darden had a gray moustache that day. (R.318). Ms. Turman was also sure, although she could not remember the exact color, that the man who shot her husband was wearing a pullover, a t-shirt, with a stripe around the neck and bottom (R.227): Mr. Stone testified that when Willie Darden got out of his car, he was wearing a plain white shirt with buttons down the front. (R.313). The several descriptions Ms. Turman did attempt also conflicted from each other: for example, she told one officer, shortly after the shooting occurred, that the man was the same height as herself, 5' 6''. (R. 288). In her pretrial deposition, she testified that the man was 5' 8'' or "maybe" six feet. (R.256). When she gave her initial description to the officer, she could not remember whether or not the man wore glasses (R.227), but by the time of trial she was adamant in her recollection that the man was definitely not wearing glasses (R.227). Ms. Turman could not even give a reasonably accurate description of the man who shot her husband, other than his race, and it is therefore difficult to imagine how she could then accurately identify him. Her difficulty in providing descriptive detail also lends credence to her lack of attention at the time of her initial encounter.

The fourth Neil factor, the level of certainty demonstrated at the confrontation, is difficult to apply here. Ms. Turman's only response to the prosecutor's question, propounded while standing and pointing at the only black man in the courtroom, whether the Petitioner was "the man who shot her husband" was

"Yes, sir." (R.49-50). Petitioner would submit that any certainty demonstrated by this single response was implanted by the suggestive nature of the process itself and the leading questions propounded by the state. Mrs. Turman admitted she was still in a state of shock from the death of her husband, (R. 257), and she was obviously susceptible to the type of psycho-suggestive coercion which took place here. At trial, she did express her certainty in one area: according to her testimony, there was "no doubt in [her] mind" as to who the prosecutor was referring to when he asked whether the only black man in the courtroom was the man who shot her husband. (R.285).

The fifth and final Neil factor, the time between the crime and the confrontation, might weigh against the Petitioner were it not negated by Ms. Turman's demonstrated lack of attention at the time of the crime. Any reliability imparted to her identification by the fact that it occurred only five days after the crime is likewise nullified by her condition at the time of the confrontation, and by her inability to accurately describe the assailant prior to her identification of the Petitioner.

The record demonstrates that the pretrial hearing during which Ms. Turman identified the Petitioner was conducted in an atmosphere conducive to irreparable misidentification and that misidentification was in fact more than likely. More importantly, the record contains none of the indicia of reliability stressed by Neil and Manson.

b. Phillip Arnold

The identification of the Petitioner by Phillip Arnold also presents substantial constitutional questions. Although Arnold was not permitted to testify at trial to the impermissibly suggestive and unreliable photo array from which he made his initial identification, it is clear that his in court

identification had its sole genesis in the deliberately and unnecessarily suggestive photo array.

This Court warned against the dangers of suggestive photographic identifications in Simmons v. United States, 390 U.S. 377 (1968):

> It must be recognized that the improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. . . . This danger may be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in someway emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of the subsequent lineup or courtroom identification.

Id. at 383-84.

The fears expressed in Simmons describe precisely what happened in this case. The photograph of Petitioner bore his name-- one can hardly imagine a more suggestive emphasis, particularly in light of the fact that the witness had admittedly read accounts of the crime and the Petitioner's arrest prior to viewing the photographs. Moreover, Arnold had only a brief opportunity-- 20-25 seconds by his own testimony-- to observe his assailant, and for much of that time his attention was focused on the prostrate body of Mr. Turman.

When viewed in the light of the Neil/Manson factors, it is apparent that there are no independent indicia of reliability supporting the accuracy of Arnold's in court identification of the Petitioner. As to the first and second factors, as discussed above, Arnold had only the briefest of opportunities to observe his assailant, and during even that brief period did not devote

his full attention to the man. Arnold also testified that his mind "went blank" for some period after he saw the gun. (R.436, 500). Although a similarly brief period of observation was held sufficient to support the witness's ability to make a reliably accurate identification in Manson, that was only because the witness was not "a casual or passing observer, as is so often the case with eyewitness identification," but rather was a "trained police officer." Id. at 115. Mr. Arnold manifestly was not such a trained observer.

The third Neil factor is particularly telling: Mr. Arnold's descriptions of his assailant were no more accurate than were Ms. Turman's, and were similarly conflicting and inconsistent. For example, when he made his initial identification, by selecting the photograph conveniently labeled "DARDEN," he "didn't think" that the man he saw at the store had a moustache; in his pretrial deposition, he was considerably surer that the man "had no hair on his face." (R.498). At trial, however, after James Stone gave his testimony about Mr. Darden's moustache, (supra), Arnold could not say for sure whether or not the man had a moustache, because "it was a very thin one." (R.497). Arnold also testified that the man he saw had an unusually long face (R.443): Ms. Turman, on the other hand, testified that the man she saw had the type of fat face consistent with a heavyset person. (R.237).

The fourth Neil factor is not difficult to apply to Arnold's identification; application of this factor to the photo array which he participated in supports Petitioner's position the most of all of the factors. When initially given the photographs, Arnold immediately excluded four of the six photographs, the four which "just didn't look like him at all," either "too young or just real small." (R.449). Because Mr. Arnold was still unable to speak due to his injuries, the following exchange between he and the officers was written on a piece of paper:

"Both of these two look a little like him!"

DID HE HAVE A MOUSTACHE?

"I don't think so!"

WHAT TYPE SHIRT WAS HE WEARING?

"It was short sleeve. It was something like a red or orange and I think it was a knit material, pale."

(R.455, 475; Sheriff's Office Supplementary Report, App.I). Mr. Arnold then picked out of the two photos that looked "a little like him" the only one which was identified by a name: the photograph which Mr. Arnold ultimately selected bore a white tag with the name "DARDEN" on it. Any certainty demonstrated was clearly the product of Arnold's familiarity with the facts-- he admittedly had read about Petitioner "DARDEN'S" arrest for the murder of Carl Turman prior to selecting his "DARDEN" photograph.

Any indication of reliability supplied by application of the fifth Neil factor is likewise negated by the suggestive procedure itself, the witness's lack of opportunity to observe, and by the witness's condition at the time of the confrontation.

This trial turned on the accuracy and reliability of these two witnesses' testimony. Mr. Darden's life hangs in the balance. They simply are not reliable enough:

> Every defendant is entitled to a fundamentally fair trial, without reference to the weight of the evidence or the heinous nature of the crime. When a defendant receives the death penalty, uncorrectable after execution, the force of the rule becomes more apparent. When the defendant's defenses are alibi and misidentification, the uncorrectability of a mistake has such a consequence that the harmless doctrine must be closely scrutinized when it is clear that the error could have affected the sentence.
>
> From the time Darden was arrested, throughout his trial and sentencing, he maintained his innocence. The evidence which convicted Darden was the identification of him by Mrs. Turman, widow of the man murdered, and Philip Arnold, who was shot by the killer. Four days after the crime and one day after the funeral, Mrs. Turman, while in a distraught state, went to the courthouse for the preliminary hearing where she identified the defendant as her husband's killer. Darden was in a very small courtroom adjoining the holding cell; he was the only black person at the defense table; and there

is an indication that he was the only black person in the room. The prosecutor pointed to him and asked Mrs. Turman if this was the man who did it, to which she responded yes. All of this was over strenuous objection of Darden's counsel.

The other eye witness identification was made by Philip Arnold, who was shot at the time Mr. Turman was killed. The crime occurred September 8, 1973. Arnold testified on January 18, 1974. He had seen Darden in the courtroom during the previous two days. Arnold had been shown a photograph of Darden a few days after the crime as part of a group photographic identification procedure, evidence of which was suppressed by the state trial court. It is impossible to say whether the identification was tainted by the photograph or by Arnold seeing Darden in the courtroom, but Arnold did identify Darden as the person who was in the store with Mrs. Turman immediately after her husband was shot.

From the voir dire examination through closing argument, the jury was impressed with the seriousness of the identification issue. They accepted the validity of the identification and convicted Darden of first-degree murder. The recommendation of the death sentence by the jury was not unanimous. We do not know what the jury count was between 7 to 5 and 11 to 1. Because I believe the prejudicial argument of counsel had an impact upon the jury which was not harmless beyond a reasonable doubt and did affect their deliberations with respect to the death penalty, I dissent.

Darden v. Wainwright, supra, 699 F.2d at 1040-41 (Clark, J.)

2. Mr. Darden did not abuse the writ.

Abuse of the writ occurs if the petitioner 1.) deliberately withheld the newly asserted ground, 28 U.S.C. sec. 2244(b)(1982), from an earlier petition, or 2.) "otherwise abused the writ" because "his only purpose is to vex, harass, or delay." Id.; Sanders v. United States, supra, 373 U.S. at 18; see e.g., Antone v. Dugger, 465 U.S. 200, 206 (1984)("knowingly withheld" standard); Smith v. Yeager, 393 U.S. 122, 125 (1962) ("deliberately withheld"). Mr. Darden has not abused the writ on the claim of impermissibly suggestive identification procedures, and he should be allowed to so show.

Deliberate withholding requires a waiver, as that term traditionally has been understood. Such a waiver occurs only if the petitioner, "after consultation with competent counsel," intentionally relinquishes or abandons a known right or privilege. Fay v. Noia, 372 U.S. 391, 438-40 (1963). It is the petitioner whose mental state must be examined -- deliberate by pass depends on the considered choice of the petitioner. Id., 372 U.S. at 439.

The "vex, harass, or delay" language requires a motive to utilize multiple petitions to accomplish something other than release. Sanders, supra, 373 U.S. at 8 ("needless piecemeal litigation"); Fay, supra, 372 U.S. at 433 (dismissal warranted if petitioner has deliberately sought to subvert or delay orderly adjudication). Mere objectively unreasonable conduct, negligence, or procedural default -- the simple failure due to lack of knowledge or inadvertence on the petitioner's part or some failing on counsel's part in which the petitioner did not knowingly and intelligently concur -- does not suffice. Mr. Darden pled that he had not intentionally withheld any claim, and that he did not knowingly, intentionally, and intelligently agree to omit, abandon, or "sandbag" any claim.

a. Phillip Arnold's Identification

The Phillip Arnold claim was not raised in any prior petition. The lower court was wrong when it wrote that "[t]his claim was presented in petitioner's first petition for writ of habeas corpus and abandoned as being not well founded in the context of a separate issue." Darden v. Dugger, 825 F 2d at 294. Since this was the lower court's basis for rejecting a major constitutional challenge, certiorari should be granted, the case should be remanded, and petitioner should be presented the opportunity to refute the allegation of abuse. Advisory Note to Rule 9; Price v. Johnston, 334 U.S. 266 (1948).

b. Mrs. Turman's Identification

The lower court was correct that counsel claimed in the 1979 petition that Mrs. Turman identification violated due process. It is also true that counsel, not petitioner, wrote in a pre-hearing stipulation that the claim was withdrawn "as being not well-founded in the context of a separate issue." Darden v. Dugger, 825 F.2d at 294. This enigmatic withdrawal by counsel of a claim in a petition was wrongly classified by the court of appeals as the epitome of abuse of the writ:

> Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. Witt, 755 F.2d at 1397. Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing. Kuhlmann, 106 S.Ct. at 2622 n. 6; Sanders, 373 U.S. at 18, 83 S.Ct. at 1078; Wong Doo v. United States, 265 U.S. 239, 241, 44 S.Ct. 524, 525, 68 L.Ed. 999 (1924). "The petitioner had full opportunity to offer proof ... [on this claim] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then." Wong Doo, 265 U.S. at 241, 44 S.Ct. at 525. The federal courts will not "tolerate needless piecemeal litigation, or ... entertain collateral proceedings whose only purpose is to vex, harass, or delay." Sanders, 373 U.S. at 18, 83 S.Ct. at 1078.

Darden v. Dugger, 825 F.2d at 294. The lower court's analysis is in conflict with this Court's precedents, and federal statute.

It is petitioner's, not counsel's, conduct, which determines the abuse of the writ question. Sanders v. United States, 373 U.S. 1 (1983); 28 U.S.C. sec. 2244(b); Rule 9(b). Mr. Darden pled that there was nothing volitional on his part about the withdrawal of this claim, and he offered to prove it. However, the Eleventh Circuit Court of Appeals assigned counsel's action to petitioner, as has become that circuit's habit of late. See Moore v. Kemp, 824 F.2d 847, 851 (11th Cir. 1987)(en banc); Funchess v. Wainwright, 788 F.2d 1443, 1445 (11th Cir. 1986); Witt v. Wainwright, 755 F.2d 1396, 1397-98 (11th Cir.), rev'd on

other grounds, 469 U.S. 412 (1985). This subjective test for abuse is not the law, and it should be corrected.

3. This is a Claim of Innocence.

As the petition illustrates, there is a very real question regarding Mr. Darden's innocence. There is at the very least a colorable question of factual innocence. Suggestive identification procedures are disallowed because they skew the truth, not because of some arcane constitutional concept. Identifications such as the one in this case are attackable because when identification is the evidence of guilt, bad identifications present a colorable claim of factual innocence.

The court of appeals declined to decide the merits of this claim, inter alia, because "there was overwhelming . . . eyewitness . . . evidence. . . ." Darden v. Dugger, 825 F.2d at 294. This is too circular to accept -- a challenge to eyewitness testimony should not be denied based upon the fact that there is testimony by eyewitnesses.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully Submitted,

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C. Florida Statutes Section 921.141 (1985)

D. Transcript excerpt, pre-trial hearing

E. Affidavit of Christine Bass

F. Affidavit of Reverend Sam Sparks

G. Affidavit of Reverend David A. Hess

APPENDIX A—Continued

Q If Mr. Bernstein said that there was a meeting at your office and that there were other such meetings in the hallways and/or his office where you discussed mitigating factors, can you swear to the Court, sir, today, that that is not a fact?

A I cannot swear to that.

Q Did you mean to say that in your affidavit?

A Did I mean to say?

Q That Mr. Bernstein was lying?

A No, I didn't mean to say that.

Willie Jasper DARDEN, Petitioner-Appellant,

v.

Richard L. DUGGER, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 86-3705.

United States Court of Appeals, Eleventh Circuit.

Aug. 5, 1987.

Florida prisoner under sentence of death filed petition for writ of habeas corpus. The United States District Court for the Middle District of Florida, No. 86-0146-Civ-T-10-C, Wm. Terrell Hodges, Chief Judge, denied petition without hearing, and petitioner appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) dismissal of petition based on claim of ineffective assistance of counsel without hearing was not abuse of discretion, where claim had been decided on merits in previous petition, and affidavit submitted by petitioner were contrary to overwhelming evidence submitted at trial; (2) petitioner was not entitled to hearing on claim that suggestive and unreliable identification procedures were used to obtain his conviction, where petitioner presented claim in his first petition but later withdrew and abandoned it; and (3) petitioner was not entitled to hearing on claim that Florida's death penalty statute was unconstitutional, where petitioner presented claim in first petition and it was denied on the merits.

Affirmed.

1. Habeas Corpus ⇐7

Dismissing successive petition for writ of habeas corpus without hearing is within sound discretion of federal trial judges.

2. Habeas Corpus ⇐7

Federal court may dismiss subsequent petition for habeas corpus on ground that petitioner abused writ when petitioner files petition raising grounds that were available but not relied upon in prior petition, or engages in other conduct that disentitles him to relief he seeks.

3. Habeas Corpus ⇐7

Dismissal of successive petition for writ of habeas corpus based on claim of ineffective assistance of counsel without hearing was not abuse of discretion, where petitioner presented claim in his first petition for writ of habeas corpus, petitioner directly challenged investigative techniques and thoroughness of defense counsel with regard to alibi defense, and affidavits submitted by petitioner to support his alibi were contrary to overwhelming evidence presented at trial. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

4. Habeas Corpus ⇐7

Petitioner may be deemed to have waived his right to hearing on successive application for federal habeas relief when he deliberately abandons one of his grounds at first hearing. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

5. Habeas Corpus ⇐7

Habeas petitioner was not entitled to hearing on claim that suggestive and unreliable identification procedures were used in obtaining his conviction, where petitioner raised claim in his first petition for writ of

habeas corpus, but later withdrew and abandoned claim as being not well founded, and there was overwhelming evidence to support finding of guilt. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254.

6. Habeas Corpus ⇐7

Federal habeas petitioner was not entitled to hearing based on claim that Florida's death penalty statute was unconstitutional, where petitioner raised claim in his first petition for writ of habeas corpus and it was denied on the merits, and United States Supreme Court held that substantially similar death penalty statute was constitutional. Rules Governing § 2254 Cases, Rule 9(b), 28 U.S.C.A. foll. § 2254; U.S.C.A. Const.Amends. 8, 14.

Larry Helm Spalding, Office of Capital Collateral Representative, James Lohman, Mark Evan Olive, Robert Augustus Harper, Jr., Tallahassee, Fla., for petitioner-appellant.

Jim Smith, Atty. Gen., Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY, JOHNSON and CLARK, Circuit Judges.

FAY, Circuit Judge:

Willie Jasper Darden ("Petitioner"), a Florida prisoner under sentence of death, appeals the district court's order dismissing his third petition for writ of habeas corpus without a hearing. Because all issues raised are either successive and have been previously heard and determined or have been brought up and abandoned, thereby constituting an abuse of the writ, we affirm.

I. FACTS [1]

The thirteen years of judicial proceedings in this case manifest substantial care and patience. Although a detailed recitation of the facts of this case appear in at least four opinions from different courts,[2] we again set forth the evidence presented at petitioner's trial in January, 1974, that led to his conviction and death sentence.

On September 8, 1973, at about 5:30 p.m., petitioner entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman, who worked nights in a juvenile home, had awaked at about 5:00 p.m., had a cup of coffee at the store with his wife, and returned home to let their dogs out for a run. Mrs. Turman showed the man around the store. Petitioner stated that he was interested in purchasing about $600 worth of furniture for a rental unit, and asked to see several items. He left the store briefly, stating that his wife would be back to look at some of the items.

Petitioner returned a few minutes later asking to see some stoves, and inquiring about the price. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to an area of the store where some boxsprings and mattresses were stacked against a wall. At that time Mr. Turman appeared at the back door, Mrs. Turman screamed while the man reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, the man tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. Petitioner left Mr. Turman face-up in the rain, and told Mrs. Turman to get down on the floor approximately five feet from where her husband lay dying. While she begged to go to her husband, petitioner told her to remove her false teeth. Petitioner unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry, "Lord, have mercy." He told her to get up and go towards the front of the store.

Meanwhile, a neighboring family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her sixteen year-old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Mr. Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip not knowing what she meant, asked petitioner, who he could see because the light bulb inside the door was on, to help get Mr. Turman inside. The man replied, "Sure, buddy, I will help you." As Phillip looked up, the man was pointing a gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away, and was shot a second time in the neck. While he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. Mrs. Hill testified that she heard four shots fired—a single shot, then three in a row, at approximately 6:00 p.m. Mrs. Hill had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip, she saw a late model green Chevrolet leave the store and head towards Tampa on State Highway 92. Phillip survived the incident; Mr. Turman, who never regained conaciousness, died later that night.

Minutes after the shooting, petitioner was driving towards Tampa on highway 92, just a few miles away from the furniture store. He was out on furlough from a Florida prison, and was driving a car borrowed from his girlfriend in Tampa. Petitioner testified that because he was driving fast on a wet road he was unable to slow down as he came up on a line of cars in his lane. He attempted to pass, but was forced off the road to avoid a head-on collision with an oncoming car. Petitioner crashed into a telephone pole. The driver of the oncoming car, John Stone, stopped his car and went to petitioner to see if he could help. Stone testified that as he approached the car, petitioner was zipping up his pants and buckling his belt.[3] Police at the site of the collision later identified petitioner's car as a 1969 Chevrolet Impala of greenish golden brown color. Petitioner paid a bystander to give him a ride to Tampa. Mary Simmons, the driver of the car, testified that she picked him up at approximately 6:30 p.m. Petitioner later returned with a wrecker, only to find that the car had been towed away by the police.

By the time the police arrived at the scene of the accident, petitioner had left. The fact that the car matched the description of the car leaving the scene of the murder, and that the accident had occurred within three and one-half miles of the furniture store and within minutes of the murder, led police to suspect that the car was driven by the murderer. They searched the area. An officer found a revolver about forty feet from the crash site. The arrangement of shells within the chambers exactly matched the pattern that should have been found in the murder weapon: one shot, one misfire, followed by three shots, with a live shell remaining in the next chamber to be fired.[4] A specialist for the FBI examined the pistol and testified that it was a Smith & Wesson .38 special revolver. An examination of the bullet that killed Mr. Turman revealed that it came from a .38 Smith & Wesson Special.

1. The recitation of the facts is essentially the same as set forth by the Supreme Court in *Darden v. Wainwright*, 477 U.S. 187, 106 S.Ct. 2464, 2467-68, 91 L.Ed.2d 144 (1986).

2. *See Darden v. Wainwright*, 477 U.S. 187, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Darden*, 699 F.2d 1031 (11th Cir.1983); *Darden*, 513 F.Supp. 947 (M.D.Fla.1981); *Darden v. State*, 329 So.2d 287 (Fla.1976).

3. At trial Petitioner admitted that his pants were unzipped and his buckle was undone but claims that he thought he was hurt and wanted to examine himself.

4. Both Mrs. Turman and Phillip Arnold described the sequence of the shots in this manner. Mrs. Hill testified that she heard one shot, then three shots in a row.

On the day following the murder petitioner was arrested at his girlfriend's house in Tampa. A few days later Mrs. Turman identified him at a preliminary hearing as her husband's murderer. Phillip Arnold selected petitioner's picture out of a spread of six photographs as the man who shot him.[5]

II. PROCEDURAL HISTORY

Petitioner was tried and found guilty of murder, robbery and assault with intent to commit murder in the Circuit Court of Citrus County, Florida, in January, 1974. Pursuant to Florida's capital sentencing statute, the same jury that convicted petitioner heard further testimony and argument in order to make a recommendation as to whether a death sentence should be imposed. The jury recommended a death sentence, and the trial judge accepted the jury's recommendation. On direct appeal, the Florida Supreme Court affirmed both the conviction and the sentence. *Darden v. State*, 329 So.2d 287 (Fla.1976).[6] The United States Supreme Court granted a petition for writ of certiorari, *Darden v. Florida*, 429 U.S. 917, 97 S.Ct. 308, 50 L.Ed.2d 282 (1976), and limited review to the sole issue of whether the prosecution's summation to the jury deprived petitioner of due process of law. *Darden v. Florida*, 429 U.S. 1086, 97 S.Ct. 729, 50 L.Ed.2d 747 (1977). After that issue was briefed and orally argued, the Court dismissed the writ of certiorari as improvidently granted. *Darden v. Florida*, 430 U.S. 704, 97 S.Ct. 1671, 51 L.Ed.2d 751 (1977).

Petitioner next filed a motion for post-conviction relief pursuant to Fla.Crim.P. 3.850 in the state trial court alleging ineffective assistance of counsel based on counsel's alleged failure to investigate an alibi defense. The state trial court denied relief and the Florida Supreme Court affirmed on the merits. *Darden v. State*, 372 So.2d 437 (Fla.1979). After the Governor signed a warrant for petitioner's execution, petitioner filed a petition for writ of habeas corpus in federal district court. The district court considered all claims on the merits and denied the petition. *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla.1981).[7] Petitioner raised three issues in his first appeal to this court. He challenged the process by which prospective jurors were excused, the propriety of the prosecutor's summation and the effectiveness of counsel. This court affirmed the district court's order denying relief. *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir.1983). This court granted rehearing *en banc*, and affirmed the district court. *Darden v. Wainwright*, 708 F.2d 646 (11th Cir.1983). Following a second rehearing *en banc*[8] this court reversed on the claim of improper excusal of a prospective juror. *Darden v. Wainwright*, 725 F.2d 1526 (11th Cir. 1984).[9] The United States Supreme Court granted the State's petition for certiorari on that claim, vacated the Court of Appeal's judgment and remanded for reconsideration in light of *Wainwright v. Witt*,

5. There are some minor discrepancies in the eyewitness identification procedure. However, both Mrs. Turman and Phillip Arnold repeatedly and unhesitatingly identified petitioner as the attacker at trial. *See Darden*, 106 S.Ct. at 2468 n. 1.

6. Six issues were raised in the appeal. Of the six, two of the same issues raised in the most recent federal habeas petition were raised and disposed of on the merits by the Florida Supreme Court. Those issues concerned the constitutionality of the Florida death penalty statute, and the pretrial identification procedures.

7. While petitioner alleged some twenty-five constitutional violations, of import in this appeal is the disposition in the first federal habeas petition of the three claims raised in this petition. Petitioner alleged: ineffective assistance of counsel for failure to investigate an alibi defense; the unconstitutionality of Florida's death penalty statute; and withdrew and abandoned the constitutional attack on the pretrial identification procedures.

8. While a second death warrant was signed in early August, 1983, by the Governor of Florida, the court's decision to rehear the case *en banc* effectuated a stay of execution. *Darden v. Wainwright*, 715 F.2d 502 (11th Cir.1983).

9. The court agreed with the first panel's evaluation of the claims regarding prosecutorial summation and ineffective assistance of counsel and reinstated the relevant portions of the panel's decision. *Darden*, 699 F.2d at 1033–37.

469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). On remand, the *en banc* court denied relief, *Darden v. Wainwright*, 767 F.2d 752 (11th Cir.1985).

Petitioner filed another motion for post conviction relief pursuant to Fla.R.Crim.P. 3.850 in the state trial court. Petitioner raised five new constitutional issues[10] and realleged error relating to the prosecution's summation. The state trial court denied relief and the Florida Supreme Court affirmed *Darden v. State*, 475 So.2d 214 (Fla. 1985). Petitioner then filed his second habeas petition in district court asserting the same challenges rejected by the state courts. The State plead abuse of the writ in its motion to dismiss and the district court dismissed the petition with prejudice as an abuse of the writ pursuant to 28 U.S.C. § 2244(b) (1982) and Rule 9(b) of the Rules Governing Section 2254 cases. *Darden v. Wainwright*, No. 85–1420–Civ–T–10 (M.D.Fla. September 3, 1985). On the same day, our court denied petitioner's emergency motion for stay of execution and denied the motion for certificate of probable cause. *Darden*, 772 F.2d 668 (11th Cir.1985). Petitioner filed an application for stay of execution in the Supreme Court. The Court treated this as a petition for certiorari and granted the application, thus staying petitioner's execution. *Darden*, 473 U.S. 928, 106 S.Ct. 21, 87 L.Ed.2d 699 (1985).

The Court in *Darden*, 477 U.S. 187, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), addressed the following three claims concerning the validity of petitioner's criminal conviction and death sentence: (1) whether the prosecution's closing argument during the guilt phase of a bifurcated trial rendered the trial fundamentally unfair and deprived the sentencing determination of the reliability required by the eighth amendment; (2) whether the exclusion for cause of a member of the venire violated the principles announced in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); and (3) whether petitioner was denied effective assistance of counsel at the sentencing phase of his trial. The Court of Appeals was affirmed and the case was remanded for proceedings consistent with the opinion.[11] Accordingly, the Eleventh Circuit sitting *en banc* pronounced the judgment of the Supreme Court as the judgment of the *en banc* court and affirmed the district court's order denying the petition for writ of habeas corpus. *Darden v. Wainwright*, 803 F.2d 613 (11th Cir.1986).

On the same day the Eleventh Circuit opinion was published, petitioner filed a third motion for post-conviction relief in state court pursuant to Fla.R.Crim.P. 3.850. The motion was based on two claims. The first claim alleged ineffectiveness of counsel for failure to investigate the alibi defense. The state court found that failure to locate witnesses fixing an earlier time of the crime was not the result of ineffectiveness or lack of diligence.[12] The second claim alleged the unconstitutionality of Florida's death penalty statute. The second claim was denied on the merits.

10. The five new constitutional issues included: (1) alleged violations of the fifth, sixth, eighth and fourteenth amendments due to the trial court's use of non-record psychological evaluation in imposing the sentence of death when the evaluation was obtained without the petitioner's waiver of his right to be free from self-incrimination, or to confront the author of the report; (2) alleged eighth and fourteenth amendment violations due to lack of consideration by the reviewing authority of the extensive nonstatutory mitigating evidence and findings of the trial court; (3) alleged eighth amendment violation because the preparation for and conduct of the sentencing hearing robbed the jury and judge of the ability to conduct individualized sentencing; (4) alleged eighth and fourteenth amendment violations resulting from comments made by the trial judge allegedly resulting in the reduction of the jurors' sense of responsibility with regard to its function at sentencing; and (5) alleged sixth, eighth and fourteenth amendment violations resulting from ineffective assistance of appellate counsel.

11. Petitioner's motion for rehearing was denied. — U.S. —, 107 S.Ct. 34, 92 L.Ed.2d 774 (1986).

12. The state trial court did not reach the question of the effect of the new evidence in the form of affidavits because it was not a proper matter for consideration in a 3.850 motion. It can only be presented in an error coram nobis petition to the Florida Supreme Court. *State v. Darden*, No. 69,481 (Fla. 10th Cir. October 15, 1986).

The Florida Supreme Court affirmed the trial court's order denying relief and denied the requested stay of execution.[13] *Darden v. State*, 456 So.2d 136 (Fla.1986). The Florida Supreme Court denied relief on petitioner's ineffective assistance of counsel claim because he was procedurally barred from raising the issue in a successive petition.[14] As to the unconstitutionality of Florida's death penalty statute, the Florida Supreme Court declared the issue procedurally barred because the claim could have been raised in his previous 3.850 motions. The Florida Supreme Court stated, however, were it to reach the merits, the court would reject the contention. *See Stewart v. State*, 495 So.2d 164 (Fla.1985); *Smith v. State*, 457 So.2d 1380 (Fla.1984); *State v. Henry*, 456 So.2d 466 (Fla.1984).

On the same day the Florida Supreme Court denied petitioner relief, petitioner filed his third federal habeas petition in district court. Petitioner again attacked the validity of his conviction and death sentence by alleging three constitutional violations. Petitioner alleges sixth, eighth and fourteenth amendment violations due to ineffective assistance of counsel for failing to investigate an alibi defense; eighth and fourteenth amendment violations due to grossly suggestive and unreliable ider . fication procedures, and eighth and fourteenth amendment violations due to the unconstitutionality of Florida's death penalty statute. The State filed a motion to dismiss the petition pleading both abuse of the writ and successive petitions. The district court entered an order dismissing the petition for writ of habeas corpus as an abuse of the writ. The court noted that the three claims presented were presented in the original petition although the arguments and contentions in support of these claims were somewhat different. Petitioner raises the same three issues in his appeal to this court as he presented in his petition to the district court.

III. DISCUSSION

[1] Dismissing a successive petition for writ of habeas corpus without a hearing is within the sound discretion of the federal trial judges. *Sanders v. United States*, 373 U.S. 1, 18, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963). "Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." *Id.* We must therefore affirm the district court's order dismissing petitioner's third habeas petition unless we find that the district court abused its discretion.[15]

Petitioner's third application for federal habeas relief contained three claims. Two of the three claims have been decided on the merits in previous petitions. It was within the district court's discretion to dismiss those two claims unless the petitioner established that the ends of justice would be served by reconsideration of the claims. *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077; *Witt v. Wainwright*, 755 F.2d 1396, 1397 (11th Cir.1985); Rule 9(b) of the Rules Governing Section 2254 cases. Whether the ends of justice require reconsideration is determined by objective factors, such as "whether there was a full and fair hearing on the original petition or whether there was an intervening change in the facts of the case or the applicable law." *Witt*, 755 F.2d at 1397; *see also Kuhlmann v. Wil-*

13. A fifth death warrant had been signed by this time.

14. Petitioner raised this issue in his first 3.850 motion, *Darden v. State*, 372 So.2d 437 (Fla. 1979).

15. Petitioner contends that the district court's order of dismissal requires reversal because the court did not address the claims presented within the proper analytical framework. We disagree. District Judge Hodges has handled these petitions for habeas corpus relief since May, 1979. The dismissal of the third petition is proper. While we do not agree with the district court's reasoning that the submission of the third petition is *a fortiori* an abuse because the filing of the second petition constituted an abuse, *Darden*, No. 86-1456 Civ-T-10(c) p. 2 (M.D.Fla. October 16, 1986), we do agree that it was within the district court's sound discretion to dismiss the third petition without a hearing. The record amply supports Judges Hodges' decision.

son, 477 U.S. 436, ——, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364 (1986) (plurality opinion) ("[T]he 'ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.").

[2] The remaining claim was presented in petitioner's first petition for federal habeas corpus relief filed in May, 1979, but withdrawn and abandoned. Since the State has affirmatively plead abuse of the writ in its motion to dismiss the third petition, petitioner has the burden to rebut the State's contention. *Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078; *Witt*, 755 F.2d at 1397. Petitioner must demonstrate that the failure to present the claim in the prior federal habeas proceeding was "neither the result of an intentional abandonment or withholding nor the product of inexcusable neglect." *Witt*, 755 at 1397. The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus. Thus, a federal court may dismiss a subsequent petition on the ground that the petitioner abused the writ when a petitioner files a petition raising grounds that were available but not relied upon in a prior petition, *Kuhlmann*, 106 S.Ct. at 2622 n. 6, or engages in other conduct that "disentitle[s] him to the relief he seeks." *Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078. With these principles in mind, we turn to the three claims presented.

A. WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILURE TO REASONABLY INVESTIGATE THE TIME OF THE OFFENSE WHEN ALIBI WAS THE DEFENSE

This claim has been exhaustively litigated and is thereby categorized as successive. Petitioner presented this claim in his first petition for writ of habeas corpus in May, 1979. Petitioner directly challenged the investigative techniques and thoroughness of defense counsel with regard to the alibi defense, and argued that his innocence would be apparent if the attorneys had represented him effectively. The claim was denied on the merits. *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla. 1981). The judgment of the district court was affirmed by this court, *Darden*, 699 F.2d 1031 (11th Cir.1983), and on this issue, by every subsequent revisitation by the Eleventh Circuit, sitting *en banc*. *See* 708 F.2d 646 (11th Cir.1983); 725 F.2d 1528 (11th Cir.1984); 767 F.2d 752 (11th Cir. 1985).

Petitioner has the burden of showing this court that the ends of justice requires reconsideration of this claim. Petitioner offers two affidavits that support his alibi. The affidavits support the alibi that petitioner could not have been in two different places at the same time. One of the affiants stated he was at the crime scene at 5:55 p.m. and opined that the crime was committed between 5:00 p.m. and 5:15 p.m. He concluded that petitioner was innocent since petitioner was reported to be in front of Christine Baas' house with car trouble from 4:00 p.m. to approximately 5:30 p.m.[16] The second affidavit corroborated the contention that the crime was committed between 5:00 p.m. and 5:15 p.m.[17]

[3] We must examine the affidavits presented in light of the total record to determine whether the ends of justice require relitigation of this claim. The overwhelming evidence of the time of the commission of the crime is contrary to the affidavits submitted by petitioner. Mrs. Turman, Mrs. Hill and Phillip Arnold all testified that the crime occurred at approximately 6:00 p.m. John Stone witnessed petitioner's automobile wreck at about 6:00 p.m. Mary Simmons offered petitioner a ride to Tampa after the 6:30 p.m. news.

16. Christine Baas is prepared to affirm that petitioner was outside her house with car trouble from 4:00 p.m. to 5:30 p.m. on the day of the murder.

17. We note that the affidavit was prepared thirteen years after the commission of the crime. The facts are layed out in detail. The affiant excused its previous non-existence because he personally believed that petitioner was guilty. He comes forth now to "save an innocent man's life."

The call reporting the homicide was received by the Lakeland Police Department at 6:31 p.m. The accident was reported to the Hillsborough County Police Department at 6:32 p.m. After reviewing the record in its entirety we conclude that petitioner has failed to meet his burden of showing that the ends of justice require a federal court to revisit this claim for a sixth time.[18] The district court, within its sound discretion, properly dismissed this claim without a hearing.[19]

B. WHETHER THE USE OF GROSSLY SUGGESTIVE AND UNRELIABLE IDENTIFICATION PROCEDURES VIOLATED PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

This claim was presented in petitioner's first petition for writ of habeas corpus but later withdrawn and abandoned as being not well founded in the context of a separate issue.[20] In his third petition for federal habeas relief, eight years later, petitioner raises this claim for the second time. In its motion to dismiss the third petition filed October 16, 1986, the State plead both abuse of the writ and successive applications as a basis for dismissal. The reasoning advanced by the State, in part rested on the record in Case No. 86-1430, heard in September, 1986, and on the record in Case No. 79-666, heard in May, 1981. Petitioner must show this court that he did not abuse the writ.

Petitioner asserts that counsel, not petitioner, deleted the identification challenge from the first petition before adjudication in the district court. He further asserts that even if abuse is shown, the merits must be heard because this involves a claim of innocence. We disagree.

[4] The record shows that the issue presented in this third petition was specifically withdrawn from the district court's consideration as being not well founded. The issue was abandoned. Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. *Witt*, 756 F.2d at 1397. Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing. *Kuhlmann*, 106 S.Ct. at 2622 n. 6; *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078; *Wong Doo v. United States*, 265 U.S. 239, 241, 44 S.Ct. 534, 535, 68 L.Ed. 999 (1924). "The petitioner had full opportunity to offer proof ... [on this claim] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then." *Wong Doo*, 265 U.S. at 241, 44 S.Ct. at 535. The federal courts will not "tolerate needless piecemeal litigation, or ... entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1078.

[5] As to petitioner's contentions of innocence, we again look at the record in its totality and agree, as did the United States Supreme Court, *Darden*, 106 S.Ct. at 2472-73, with the Florida Supreme Court that: "[T]here was overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges and a recommendation of a death sentence for first degree murder." 329 So.2d at 291 (Fla.1976). The district court, in its discretion, denied petitioner a hearing on this claim and we affirm that ruling which was based upon abuse of the writ.

C. WHETHER THE DEATH PENALTY IN FLORIDA IS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Petitioner presented this claim in his first petition for writ of habeas corpus and it was denied on the merits. *Darden*, 518 F.Supp. 947 (M.D.Fla.1981). Petitioner did not appeal the ruling conceding defeat on the merits based on the law in effect at the time the claim was presented. *See Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).[21] Petitioner included this claim in his third petition for federal habeas relief filed in October, 1986,[22] asserting that there are viable studies now available to rely upon and the intervening grants of certiorari in *McCleskey v. Kemp*, — U.S. —, 106 S.Ct. 3331, 91 L.Ed.2d 727 (1986) and *Hitchcock v. Wainwright*, — U.S. —, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986) warrant merits resolution of his claim. This claim is successive and does not warrant reconsideration because the Supreme Court decision in *McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), resolved a substantially similar challenge to the imposition of the Georgia death-penalty statute based on the Baldus Study which yielded almost identical results to the study done by Gross and Mauro that petitioner submits on his behalf.[23]

[6] In *McCleskey*, the Court declined to hold that the study presented supported an attack of Georgia's imposition of the death penalty as violative of the eighth or fourteenth amendments. In *Hitchcock v. Dugger*, — U.S. —, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Court declined to reach the claim that the Florida death-penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the eighth and fourteenth amendments, but refers the reader to "a similar challenge to the Georgia death-penalty statute. *See McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)." *Hitchcock v. Dugger*, 107 S.Ct. at 1822 n. 1. Since we are bound to follow the Supreme Court's disposition of the constitutional challenge to a substantially similar death-penalty statute on identical grounds, petitioner's request for a hearing on this claim must be denied.[24]

IV. CONCLUSION

For the foregoing reasons we AFFIRM the district court's order dismissing peti-

18. Since petitioner has failed to meet his burden of showing that the ends of justice require revisiting the claim under a sound discretion standard, it follows that he failed to meet the heavier burden of "colorable showing of factual innocence" which would be determined by reference to *all* probative evidence of guilt or innocence. *Kuhlmann v. Wilson*, 106 S.Ct. at 2627 n. 17.

19. We recognize that this issue was raised in terms of ineffective assistance of counsel. This court, *Darden*, 699 F.2d at 1037 (effective at guilt and penalty phase), as well as the Supreme Court, *Darden*, 106 S.Ct. at 2473 (effective at penalty phase), has determined that petitioner received effective assistance of counsel. The allegation of time error in the affidavits presented does not alter what has been determined regarding counsel's performance as a matter of law.

20. The denial of this claim was affirmed on direct appeal to the Florida Supreme Court in 1976. *Darden v. State*, 329 So.2d 287 (Fla.1976). *See supra* n. 6.

21. The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

22. Petitioner also filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850 on this claim in the state trial court. The trial court denied relief and the Florida Supreme Court affirmed. *Darden*, 496 So.2d 136 (Fla. 1986). The Florida Supreme Court declared petitioner procedurally barred from raising this claim but alternatively rejected it on the merits.

23. Petitioner rests his claim on the same proof as Hitchcock presented in his case before the Supreme Court. In Hitchcock's Petition for Writ of Certiorari he states that the

> magnitude of the race-based disparity in capital sentencing in Florida is virtually identical to the magnitude of the disparity in Georgia. After multiple regression analysis of the Florida data, Gross and Mauro found that the likelihood of receiving a death sentence in Florida for killing a white victim was 4.8 times greater than for killing a black victim. Using the same methodology, Baldus found a 4.3 times greater likelihood of death for killing a white victim in Georgia. *McCleskey v. Kemp*, 753 F.2d at 897 (footnote omitted). Brief for Petitioner, Petition for Writ of Certiorari at 46, *Hitchcock v. Wainwright*, — U.S. —, 106 S.Ct. 2888, 90 L.Ed.2d 976 (1986).

24. We note that the outcome of the Supreme Court case is consistent with the Florida state court dispositions finding the constitutional attack on the Florida death-penalty statute without merit. *Smith v. State*, 457 So.2d 1380 (Fla. 1984); *State v. Henry*, 456 So.2d 466 (Fla.1984); *Darden v. State*, 329 So.2d 287 (Fla.1976). Some of the lower federal courts addressing that issue concur. *See e.g., Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); *Darden v. Wainwright*, 513 F.Supp. 947 (M.D.Fla.1981).

tioner's writ of habeas corpus without a hearing on abuse of the writ as well as successive application grounds.

In re NATURAL LAND CORPORATION, Debtor.

NATURAL LAND CORPORATION, Plaintiff-Appellant,

v.

BAKER FARMS, INC., Defendant-Appellee.

No. 86-5448.

United States Court of Appeals, Eleventh Circuit.

Aug. 31, 1987.

Mortgagee petitioned bankruptcy court to dismiss debtor's petition for reorganization and to lift automatic stay due to debtor's failure to file petition in good faith. The Bankruptcy Court dismissed petition and lifted stay. Debtor appealed. The United States District Court for the Middle District of Florida, No. 84-266-Civ-Orl-18, George Kendall Sharp, J., affirmed. Appeal was taken. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) bankruptcy court could determine whether debtor filed petition in good faith, even though debtor had not filed proposal for reorganization, and (2) debtor that purchased property from mortgagors on very date that state court entered foreclosure order in favor of mortgagee filed petition for reorganization in bad faith and was not entitled to protection of stay.

Affirmed.

1. Bankruptcy ⇐⇐804

Bankruptcy court could determine whether debtor filed petition in good faith, even though debtor had not filed proposal for reorganization; taint of petition filed in bad faith would extend to any subsequent reorganization proposal and would defeat requirement to file reorganization proposal in good faith. Bankr.Code, 11 U.S.C.A. §§ 1112(b), 1129, 1129(a)(3).

2. Bankruptcy ⇐⇐804

No single factor necessarily leads to finding that petition for reorganization is filed in bad faith. Bankr.Code, 11 U.S.C.A. §§ 1112(b), 1129, 1129(a)(3).

3. Bankruptcy ⇐⇐459.5(1)

Debtor that purchased property from mortgagors on very date that state court entered foreclosure order in favor of mortgagee filed petition for reorganization in bad faith and was not entitled to protection of stay, where debtor had never paid any employees, had never previously engaged in business, had no legitimate creditors other than mortgagors, and had no assets until it acquired property. Bankr.Code, 11 U.S.C.A. §§ 362(a), 1112(b), 1129, 1129(a)(3).

4. Bankruptcy ⇐⇐459.5(1)

Debtor's contention that property's value had risen and that mortgagee therefore was not harmed by inability to foreclose was frivolous with regard to issue whether debtor had filed reorganization petition in good faith; debtor abused bankruptcy process when it used automatic stay provision to bide time in hope that value of foreclosed property would rise and produce windfall profit. Bankr.Code, 11 U.S.C.A. §§ 362(a), 1112(b), 1129, 1129(a)(3).

Raymond J. Rotella, Orlando, Fla., for plaintiff-appellant.

Phillip H. Logan, Sanford, Fla., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Oct 15 4 25 PM '86

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE JASPER DARDEN,

Petitioner,

-vs- CASE NO. 86-1456 Civ-T-10(C)

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent.
_____/

O R D E R

This case is again before the Court for consideration of the Petitioner's third successive petition for a writ of habeas corpus pursuant to 28 USCA §2254. His first petition was denied on its merits (Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981)); and, following a lengthy and somewhat convoluted process of appellate review, that denial of relief has recently been affirmed by the Supreme Court of the United States. Darden v. Wainwright, ____ U.S. ____, 106 S.Ct. 2464 (1986). The mandate of the Court of Appeals in consequence of the Supreme Court decision was filed in this Court on October 15, 1986. In the meantime, while the appeals were pending with respect to his first petition, Darden filed in this Court on September 3, 1985 a second petition for a writ of habeas corpus. This Court dismissed that petition with prejudice as an abuse of the writ, and also denied a certificate of probable cause of appeal. On the

same day, September 3, 1985, the Court of Appeals likewise denied a stay as well as a certificate of probable cause for appeal. Darden v. Wainwright, 772 F.2d 668 (11th Cir. 1985). A stay of execution was granted on that occasion by the Supreme Court, however, treating Darden's application for a stay as a petition for certiorari to review the denial of his first petition. Darden v. Wainwright, 473 U.S. ____, 106 S.Ct. 21 (1985).

The third petition, now before the Court, makes three claims. Although the arguments and contentions in support of these claims are somewhat different, all three were presented in the original petition. It seems abundantly clear, therefore, that if the filing of the second petition constituted an abuse of the writ, as it did, then the submission of the third petition is, a fortiori, an even greater abuse.

The petition for leave to proceed in forma pauperis is GRANTED but the petition for writ of habeas corpus is DENIED with prejudice as an abuse of the writ. For the same reason, the motion to stay is DENIED as is a certificate of probable cause for appeal pursuant to Rule 22(b), F. R. A. P.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 16th day of October, 1986. 4:30 p.m.

UNITED STATES DISTRICT JUDGE

OCT 16 4 PM '86

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIE JASPER DARDEN,

Petitioner,

-vs- CASE NO. 86-1456 Civ-T-10(C)

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent.
_____/

O R D E R

Before the Court is Respondent's motion to suspend application of Rule 4.17, M. D. Fla. Rules, for purposes of this petition for writ of habeas corpus. Upon due consideration the motion is GRANTED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 16th day of October, 1986.

UNITED STATES DISTRICT JUDGE

fees shall be paid by the county in which the indictment was found or the information or affidavit filed.
History.—s. 255, ch. 19564, 1939; CGL 1940 Supp. 8853(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.
History.—s. 256, ch. 19564, 1939; CGL 1940 Supp. 8853(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5); and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.
History.—s. 237a, ch. 19564, 1939; CGL 1940 Supp. 8853(246); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 348, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 80-216.
Note.—Former s. 919.23.

921.143 Appearance of victim or next of kin to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, or the next of kin of the victim if the victim has died from causes related to the crime, to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims or, when appropriate, their next of kin that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.
History.—ss. 9, 10, ch. 79-274; s. 3, ch. 84-363.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.
History.—s. 260a, ch. 19564, 1939; CGL 8426, 8427; CGL 1940 Supp. 8853(270); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In such case, the Department of Corrections may designate the correctional institution of the other jurisdiction as the place for reception and confinement of such person and may also designate the place in Florida for reception and confinement of such person in the event that confinement in the other jurisdiction terminates before the expiration of the Florida sentence. Upon imposing such a sentence, the court shall notify the Florida Parole and Probation Commission as to the jurisdiction in which the sentence is to be served. Any prisoner so released to another jurisdiction shall be eligible for consideration for parole by the Florida Parole and Probation Commission pursuant to the provisions of chapter 947, except that the commission shall determine the presumptive parole release date and the effective parole release date by requesting such person's file from the receiving jurisdiction. Upon receiving such records, the commission shall determine these release dates based on the relevant information in that file and shall give credit toward reduction of the Florida sentence for gain-time granted by the jurisdiction where the inmate is serving the sentence. The Parole and Probation Commission may concur with the parole release decision of the jurisdiction granting parole and accepting supervision.
History.—s. 261, ch. 19564, 1939; CGL 1940 Supp. 8853(271); s. 124, ch. 70-339; s. 1, ch. 79-219; s. 24, ch. 79-3; s. 12, ch. 79-42; s. 1, ch. 79-310.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the department. When delivering a prisoner to the department, the sheriff shall certify to it in writing:

(a) The date the sentence was imposed and the date the prisoner was delivered to the department.

A ----because a lot of times they change without it being registered as such.

Q Sure. And then with that---- So Hillsborough County found out, I assume, from asking the owner---- Is that correct?

A As far as I know that's who they asked.

Q ----who was driving the vehicle?

A Yes sir.

Q And with that information you did what?

A We proceeded with our investigation----

Q Excuse me. What time did you receive that information? Was that pretty quick?

A Thirty, 40 minutes.

Q Thirty, forty minutes from the time you commenced your investigation?

A No sir, from the time I got to the vehicle. It was maybe a total of an hour after the original shooting by the time we found out who it belonged to and----

Q What time would that have made it; around 6:30?

A I honestly couldn't tell you, sir.

Q All right, sir. Go on then. After Hillsborough County had conveyed this information to you that the driver reportedly was Willie Darden.

A Yes sir. That they would attempt to pick

him up later, that he wasn't there at that time and----

Q But that they would----

A ----as far as we knew, he was still enroute between where he caught a ride to this address. I mean, he caught a ride from the Lakeland Lounge and he was still proceeding west the last information we had.

Q And you got this information around 6:30, an hour after the shooting?

A Approximately.

Q And at that time it was your intention to arrest Willie Jasper Darden?

MR. McDANIEL: I object. What his intentions were at that time is immaterial; he didn't make the arrest.

THE COURT: I don't know for what purpose it was asked. I think its material. Go ahead and answer the question.

Q At that time was it your intention or your superior's intention to arrest Willie Jasper Darden?

MR. McDANIEL: Same objection.

A He was a suspect, sir.

THE COURT: I'll allow him to answer as to what his intentions were, but as to what someone else's intentions were, no.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF POLK)

CHRISTINE BASS, after being duly sworn, deposes and states:

1. In October, 1979, I testified in the Federal Court in Tampa, Florida, that Willie Darden was in front of my house from 4:00 to 5:25 or 5:30 p.m. on September 8, 1973.

2. Other than the time I testified in Federal Court, the time he was brought by the witnesses, including myself, who were waiting outside his trial, in the courthouse in Bartow at his trial, and the afternoon of September 8, 1973, when Mr. Darden came to my door to ask me to call a wrecker for him, I have never seen Willie Darden.

3. Between 1979 and 1985, I continued to speak from time to time with people about my personal knowledge of Willie Darden's exact location from 4:00 to 5:30 p.m. on September 8, 1973.

4. In mid-1985, I met Reverend David Hess through his hospital ministry at the hospital where I work. I told him my concerns about the case and we talked several times about it when he would come to the hospital on his patient calls.

5. Sometime in May or June of 1986, Reverend Hess remembered that his friend Reverend Sam Sparks had been over to see Mrs. Turman very shortly after the crime had happened. It was then we realized that Reverend Sparks may well be the missing link in the whole chain of events concerning Willie Darden and his being convicted for Mr. Turman's murder. Reverend Hess urged me to get in touch with Reverend Sparks. He said Reverend Sparks is the key to this whole thing.

6. On June 27, 1986, I first made contact with Reverend Sam Sparks. I reached him by telephone and told him what I knew: that Willie Darden was unquestionably in front of my house from 4:00 until very close to 5:30 the afternoon of the murder. After I told him this, Reverend Sparks said, "Then it couldn't be him that committed the crime." He told me he was certain he was at the Turmans' store at 5:55 that afternoon and it had to have been more than a half hour after the crime happened that he got to the store.

FURTHER AFFIANT SAYETH NAUGHT.

Christine F. Bass
CHRISTINE BASS

Sworn to and Subscribed to before me this 10 day of October, 1986.

NOTARY PUBLIC

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Oct. 13, 1988

STATE OF FLORIDA)
)
)
COUNTY OF POLK)

Affidavit of Reverend Sam Sparks

REVEREND SAM SPARKS, after being duly sworn, deposes and states:

1. My name is Reverend Sam Sparks. I was Pastor of the First Church of the Nazarene in Lakeland, Florida from October, 1973 until June, 1981.

2. On September 8, 1973, at approximately 5:30 p.m., I received a telephone call from Reverend Earl Sprowls, my predecessor at the church. He said something to the effect that Mr. Turman had been shot over at the Turmans' furniture store and asked if I could meet him over at the store at once. I asked him to pick me up.

3. I stood out on the curb and waited for Rev. Sprowls, who lived roughly 5 miles away. Soon, he arrived and we drove over to the Turmans' which was probably another 3 miles.

4. I was conscious of the time because I had a very important appointment at 6:30. I am positive that from the time Rev. Sprowls called me until the time we arrived at the Turmans' store was about 25-30 minutes.

5. When we arrived at the Turmans', I mentioned to Rev. Sprowls that I really needed to be back home by 6:30. I looked at my watch and it was 5:55. I always keep my watch on the correct time and it was correct on that afternoon.

6. At the time we arrived I noticed the Sheriff's car around behind the place as well as 2 or 3 other police cars. I can't say now whether they were police or sheriff's or what. In any case, there were several law enforcement vehicles there and a number of officers.

7. It was pandemonium there at the store when we got there. The police were busy talking to people and all. Our concern was with Mrs. Turman who was stunned and quite beside herself.

8. I don't know whether Mr. Turman was still there at that time or whether he had been taken out.

9. Based on when I got the call from Rev. Sprowls and what time it was when we got over to the Turmans' there is simply no way in heaven the crime could have occurred after 5:30. In fact, I

would say it had to be no later than 5:00 or 5:15.

10. I was never interviewed by the police or by the lawyers for Mr. Darden concerning any of this.

11. Frankly, I never knew there was any significance to the information I had until I found out that Mrs. Christine Bass swore that Willie Darden was in front of her house up until 5:30 that afternoon. If this is true, there is absolutely no way he could have committed the crime over at the furniture store. It's just not possible.

12. In May or June of 1986, Reverend David Hess, who performs hospital ministry for the All Saints Episcopal Church, came to see me. He voiced some concerns about whether Willie Darden had actually committed the crime at the Turmans' store and urged me to talk to Mrs. Christine Bass, who he said could definitely place Darden in front of her house at 5:30 on that afternoon. I knew if this was the case, he could not have committed the crimes.

13. I was somewhat hesitant initially because I always assumed Willie Darden had done the crimes. My impression, from the publicity and all and what was presented in the media was that he had confessed, which I am now told was not the case. In short, everybody considered it to be an open-shut case.

14. Shortly after Rev. ~~Davis~~ Hess came to see me, I got a call from Mrs. Bass. She said she was certain Mr. Darden was in front of her house from 4:00 p.m. until 5:25 or 5:30 the afternoon of the murder. I knew then he couldn't have done it because the crime had to have happened some time before 5:30.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Sam Sparks
REV. SAM SPARKS

Sworn to and subscribed before me
this 27 day of October, 1986.

NOTARY PUBLIC

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Oct. 12, 1988

STATE OF FLORIDA)
)
COUNTY OF POLK)

AFFIDAVIT OF REVEREND DAVID A. HESS

Reverend David A. Hess, after being duly sworn deposes and says:

1. My name is Reverend David A. Hess. I serve as Minister for the All Saints Episcopal Church Hospital Ministries.

2. The day after James Turman was shot at his furniture store on September 8, 1973, Reverend Sam Sparks mentioned to me that he had gone by the store right after the crime occurred to check on Mrs. Turman who was a member of his church. I have known Sam Sparks for 43 years.

3. At the time, and for many years after Mr. Turman was killed, I gave little or no thought to what Rev. Sparks had told me, other than feeling what a tragedy it was for the family.

4. In 1985, I began doing hospital calls for All Saints Episcopal Church in Lakeland.

5. Somewhere around the summer of 1985, I met Christine Bass, who works in the Chaplain's office at Lakeland Regional Medical Center.

6. During the course of my visiting the hospitals and my interaction with Mrs. Bass, she told me of her interest in the Willie Darden case.

7. In approximately June of 1986, after several conversations with Mrs. Bass concerning Mr. Darden's whereabouts on the afternoon Mr. Turman was shot, I came to a sudden and urgent realization. I remembered that Rev. Sparks had been by the furniture store right after the crime and it struck me that he might have important information that could help pin down the time of the intrusion and shootings.

8. As soon as I realized this, I contacted Mrs. Bass. I told her, "Chris, why didn't I think of this? Sam Sparks is the key."

9. I then put Rev. Sparks and Mrs. Bass in touch with one another.

10. I have to say, it took a while for me even to entertain the notion that the wrong man might have been arrested and convicted.

11. It was not until I came to understand the import of Mrs. Bass' testimony that I realized it mattered, in any legal sense, that Sam Sparks had been over at the Turmans right after the crime. Other than Mrs. Bass, I was the only person who realized the significance of putting together Rev. Sparks' experience and Mrs. Bass' account of Mr. Darden being at her house at 5:30 until the two of them compared notes just recently. I am thankful that I have been able, after so many years, to bring together the two individuals having this crucial information and regret that it has taken until now for it all to add up.

Further affiant says naught.

REVEREND DAVID A. HESS

Sworn to and Subscribed
before me this 10 day
of October, 1986.

NOTARY PUBLIC

My commission expires:

Notary Public, State of Florida
My Commission Expires Oct. 11, 1986